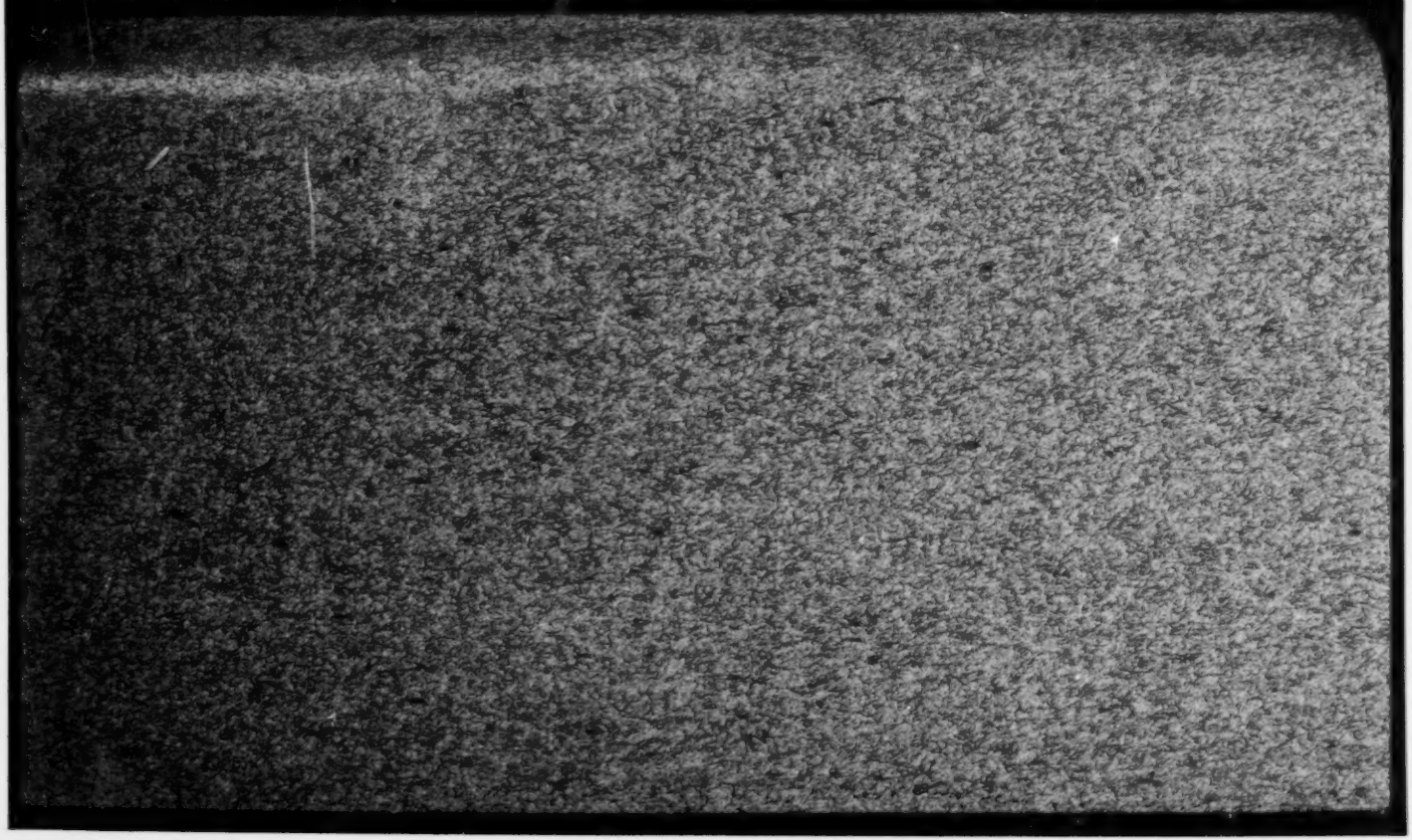

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA ex rel. WILLIAM A. KETCHAM, Attorney General, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to revise a judgment of the Supreme Court of Indiana which affirmed a judgment of the Superior Court of Marion County, Indiana, in favor of the State of Indiana against the Terre Haute & Indianapolis Railroad Company for $913,905.01, on the ground that certain statutes of the State of Indiana passed in 1897, on which the suit is based and to which the judgment gives effect, are repugnant to the contract clause of the Constitution of the United States (section 10, article 1) and to the Fourteenth Amendment, and that property of the plaintiff in error has been taken without due process of

law and that it has been denied the equal protection of the laws, in contravention of the Fourteenth Amendment.

The plaintiff in error was incorporated under the name of the Terre Haute and Richmond Railroad Company by an act of the general assembly of Indiana, approved January 26, 1847, for the purpose of building a railroad from a point on the western line of the State of Indiana, eastwardly through Terre Haute, Greencastle and Indianapolis to Richmond, Indiana. The charter is annexed to the complaint as Exhibit A., and is printed in full at pages 15 to 22 of the record. It gave the corporation the right to "charge and receive such tolls and freights * * * as shall be for the interest of said company, and to change, lower, or raise at pleasure" (sec. 22), and to make "semi-annual dividends of so much of the profits as the corporation may deem expedient," and to "retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper" (sec. 24). Rec. 20. The present suit involves the construction of section 23 which reads as follows (Rec. 20):

"Section 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

The legislature never regulated the tolls and freights, and never required the company to furnish a statement of its expenditures, expenses or profits.

On January 17, 1873, the company duly surrendered its char-

ter in pursuance of sec. 36 of the general railroad law of the State passed May 11, 1852, to-wit:

"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company. *The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized*; and, thereupon, said company shall possess such powers so accepted and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

On May 28, 1875, the State commenced an action against the company in the Superior Court of Marion County to recover the moneys claimed to be due to the State in the present suit. Rec. 22. The suit was brought in pursuance of a written agreement between the company and the State, executed by Governor Hendricks, the lieutenant governor and the attorney general, under a joint resolution of the General Assembly, approved March 10, 1873. Rec. 624. The written agreement, which is dated October 5, 1874, provided that the State should institute an action "in the Superior Court of Marion county for the recovery of any money which may be due the State or the school fund of the State, under and by virtue of said companies' charter of January 26th, 1847, and the amendments thereto." The company agreed to enter its appearance and stipulated "that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the State or school fund of the State from said old company or companies (by whatsoever name or names) under and by virtue of said charter and amendments thereto and the law and facts applied thereto, then and in that case, the company as now organized shall pay such amount and judgment shall be rendered in said action for money, for the sum that may be found due." Rec. 620.

The company appeared and demurred to the State's complaint, which was substantially identical with the complaint in

the present suit, except the references in the latter to the unconstitutional legislation of 1897, and to the former suit. The court sustained the demurrer and on May 9, 1876, rendered judgment for the defendant, on the ground that section 23 of the charter did not require the company to account to the State for surplus profits in the absence of legislation regulating its tolls. The opinion of the court filed on sustaining the demurrer, after a careful analysis of different sections of the charter, says:

"In view, therefore, of the construction placed upon the different sections, we conclude that the State can not call upon the defendant to pay surplus earnings over to the State as a part of the school funds without having previously legislated by regulating the amounts of tolls and freights. * * * This must be a correct view of the question, for the terms of the twenty-third section do not limit the amount of dividends that may be made under the extremely liberal provisions of the twenty-second and twenty-fourth sections, until such time as the legislature may regulate the tolls and freights, and the regulation of the tolls and freights by the legislature operates to limit the amount of earnings to be thereafter divided. The stockholders are not, without further legislation, prohibited from receiving any amount of dividends either annually or in the aggregate amount, nor the company prohibited from regulating tolls and freights so that they may be able to make larger dividends. It follows from this that the stockholders have a vested right in the earnings and accumulations already made by reason of the State having failed to act under the provisions reserved by the terms of the charter." Rec. 616, 617.

The State appealed to the General Term of the Superior Court, which on May 27, 1876, affirmed the judgment for the defendant, and thence to the Supreme Court of Indiana, where the judgment was affirmed in 1878 on the ground of irregularity and insufficiency of the record, without passing upon the merits. State vs. Terre Haute & Indianapolis R. R. Co. 64 Ind. 297.

The making of the agreement of October 5, 1874, was duly reported by the attorney general to the governor, in an official report dated November 6, 1874, which sets forth the agreement between the State and the company in haec verba. The report and agreement were submitted by the governor to the general

assembly at its session of 1875, before the suit for which the agreement provided was instituted. Rec. 619. On November 7, 1876, the attorney general made the following report to the governor. Rec. 623:

"The Terre Haute and Indianapolis Railroad Company.

My immediate predecessor in office, Hon. J. C. Denny in his report of November 6th, 1874, gives the history of this case to that date. Since then a civil action was brought on behalf of the State on relation of the attorney general against the company in the superior court of Marion county, demanding judgment in round numbers for a million and a half dollars. After full argument before the full bench of three judges of said court and presentation of printed briefs, the court decided against the State, mainly upon the ground that, under the provisions of the special charter to the company, legislation regulating the tolls and freights of the company was a pre-requisite to any recovery for the State. No such legislation has ever been had and an appeal was taken to the supreme court, where it is now pending."

Clarence A. Buskirk.

Dated November 7, 1876.

It was supposed that the surrender of the company's charter in 1873, followed by the foregoing judgment in its favor in 1876, affirmed by the Supreme Court of Indiana in 1878, put at rest the claim that the company was liable to the State under section 23 of its charter. That view seems to have been acquiesced in for twenty years or more until 1897, when the legislature passed four statutes, which, for flagrant violation of constitutional guaranties, are without a parallel in the history of legislation. They are printed in full as an appendix to this brief. By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive.

The second act passed February 18, 1897, undertook to amend

the statute under which the company had surrendered its charter, twenty-four years before, by providing that "whenever any railroad company * * * shall have heretofore accepted the provisions of the general railroad law, * * * all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said State, *notwithstanding said acceptance*, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and *notwithstanding such acceptance* any and all provisions of said charter may be amended, revised, repealed or *added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May* 11, 1852."

The third act, passed February 24, 1897, undertook to revive and amend section 23 of the company's charter, which had been surrendered twenty-four years before, by imposing obligations not found in the original section and by declaring that the right of the State "shall be the same as though this amendment had been originally a part of the charter of said railroad, and, as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law."

Having thus declared ex post facto that the company's surrender of its charter made in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded, by the fourth and last act of the series, to deal with the surplus profits of the company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are *hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose*" (sec. 1), and the attorney general was directed to sue for their recovery. The present suit was brought for that purpose.

The complaint sets forth the charter of 1847, which is made an exhibit, the surrender thereof by the company on January 17, 1873, the judgment of 1876 in favor of the company, and the

legislation of 1897. It concludes its recital of the legislation of 1897 with the following allegation:

"And thereupon afterwards said general assembly did, by an act approved on the 4th day of March, 1897, appropriate for the use of common schools the net earnings of said defendant, after dividends amounting to fifteen per centum per annum from and after the time when the earnings of said road had amounted to an amount sufficient to repay the cost of construction, with interest thereon at the rate of ten per centum; and it also required that the said defendant company should account to the relator herein for the use of the common schools of the State of Indiana for such net earnings so in excess of said dividends of fifteen per centum, and did authorize and require of the relator herein to demand and enforce such accounting by proper proceedings in court, and thereupon afterwards, to-wit; on the 13th day of March, 1897, the plaintiff by its attorney general, being thereunto duly authorized and empowered, did demand of the defendant company an accounting of said net receipts so in excess of said fifteen per centum from and after the time when the cost of construction with ten per centum thereon had been earned, and did demand that the same should be paid over to said attorney general for the use and benefit of the common schools; but so to do the defendant wholly failed, neglected and refused.

Plaintiff further charges that if the account were properly taken a large balance, to-wit, a balance in excess of $3,000,000, would be due and owing to the plaintiff for the use of its common schools." Rec. 14.

The prayer is for an accounting and "that in taking said account it may be ascertained what was the true cost of the construction of said railroad, and at what time the net earnings of said railroad had equaled such cost of construction, together with interest thereon at the rate of ten per centum per annum, and what amount from and after that time there was of the net earnings of said road in excess of fifteen per centum upon the cost of such construction." Rec. 15.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and, in support of the demurrer, insisted that the complaint "seeks to take from this defendant property in which it has

vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth, and to accomplish this result invokes the aid of laws enacted by the general assembly of the State of Indiana at its regular session in 1897, which said laws and all the acts and doings of the plaintiff in attempting to deprive defendant of its property and to invalidate said judgment are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5, and of section 1 of article 14 of the amendments to said Constitution." Rec. 36.

The court overruled the demurrer. Rec. 37. The defendant filed an answer in eleven paragraphs. Rec. 45, 56, 58. The first was a general denial. The second, third and eleventh paragraphs set up defenses under the Constitution of the United States. The court sustained a demurrer to the second and eleventh (Rec. 58, 63) paragraphs, and at the trial overruled the defense under the Constitution of the United States, set up in the third paragraph. We print here the three paragraphs of the answer which raise federal questions.

"Paragraph 2. Defendant, further answering, says that after it became incorporated under the act of the general assembly of the state of Indiana, approved January 26, 1847, and before any part of the railroad authorized by that act had been completed or put in operation, this defendant solicited the passage of an act by said general assembly, amending its original charter of 1847, and thereupon said general assembly passed an act entitled, 'An Act to amend the act entitled an act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26, 1847, and the several acts amendatory of said act,' approved January 20, 1851. And this last named act was immediately upon its passage and approval, accepted and adopted by defendant; that pursuant to the terms of said act of 1851, the railroad of defendant was terminated at Indianapolis, Indiana, instead of Richmond, Indiana, and has so remained ever since; that in the year 1852 defendant commenced to operate, between Indianapolis and Terre Haute, Indiana, that portion of the railroad which it was authorized to build and operate, but did not construct nor put in operation that portion of its road between Terre Haute and the eastern boundary line of the

state of Illinois until the year 1870, and since said last named year it has owned and operated only that portion of the railroad authorized by its charter of 1847 which lies between Indianapolis and said Illinois line, and has never at any time owned nor operated a railroad between said Illinois line and Richmond, Indiana.

"Defendant says that notwithstanding these facts, which at the time of the passage of the several acts hereinafter named, were, and for many years prior thereto had been well known to the plaintiff and the relator herein, and notwithstanding the further fact that defendant, on the 17th day of January, 1873, filed in the office of the secretary of state of Indiana an acceptance by it of an act entitled, 'An Act to provide for the incorporation of railroad companies,' approved May 11, 1852, the general assembly of the state of Indiana, at its regular session in 1897, at the suggestion and under the advice of the relator herein, passed, and the governor of said state approved, the following acts, to which reference is made in the complaint herein, to-wit: The act of January 27, 1897, declaring that a large amount of money is due to the state of Indiana for the use of the common schools, under section 23 of the original charter, and requiring defendant to furnish a statement of its expenditures, receipts and profits; the act of February 18, 1897, amending section 36 of the general railroad law of May 11, 1852, so as to provide that the acceptance by defendant of said railroad law should not operate as a surrender of its original charter and the acts amendatory thereof; the act of February 24, 1897, amending section 23 of defendant's original charter so as to diminish the rights and largely increase the obligations of the defendant to the state of Indiana, as such rights and obligations existed under sections 22, 23 and 24 of defendant's original charter; the act of March 4, 1897, appropriating for the use of the common schools of the state of Indiana certain alleged surplus profits arising from the operation of defendant's road, and directing the collection, by the relator herein, of said profits.

"Defendant says that at the time it accepted, as aforesaid, the general railroad law of 1852, it was not indebted in any way to the state of Indiana for any of the profits made by it in the operation of the railroad owned and operated by it as aforesaid, nor was it then nor is it now indebted to said state of Indiana, nor to the treasurer of said state, nor to the common schools thereof, in any sum whatever, and these facts were well known to the plaintiff and the relator herein when the several acts here-

inbefore mentioned were passed by the general assembly of the state of Indiana at the regular session thereof in 1897, and by the passage of said last named acts, and by the prosecution of this action against the defendant, the state of Indiana, plaintiff herein, and the relator, the attorney general thereof, were and are seeking to take this defendant's property for public use, without just compensation, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired under the provisions of its original charter and the acts amendatory thereof, and to deprive this defendant of its property and the enjoyment thereof, without due process of law, all of which acts and doings defendant says are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution." Rec. 45.

The court sustained a demurrer to the foregoing defense. Rec. 58.

"Paragraph 3. Defendant, further answering, says: That some time prior to 1873 the state of Indiana, plaintiff herein, on the relation of the prosecuting attorney of Putnam county, Indiana, filed an information against this defendant in the circuit court in and for the said county of Putnam, seeking a forfeiture of the charter granted defendant by the act of the general assembly of the state of Indiana, approved January 26, 1847, and the acts amendatory thereof, because of certain alleged acts and doings of the defendant set forth in said information, which acts and doings so set forth are identical with the acts and doings set forth in the complaint herein, and upon which plaintiff now bases the right of recovery herein; that said action was taken on change of venue to the circuit court in and for the county of Owen and state of Indiana, and a trial thereof in said last named court resulted in a disagreement of the jury; that subsequent to such trial and whilst said action was still pending in said Owen circuit court an agreement was made and entered into between the plaintiff herein, the state of Indiana, and this defendant, under and pursuant to joint resolution No. 16, adopted by the general assembly of the state of Indiana, entitled, 'A joint resolution in relation to railroad companies and corporations, and defining the duties and giving directions to the attorney general as to suits and proceedings now pending and which may hereafter be brought,' approved March 10, 1873, which agreement was in the words and figures following, to-wit:

"The State of Indiana, ex rel. John C. Robinson, Prosecuting Attorney, etc., vs. The Terre Haute and Indianapolis Railroad Company, in the Owen circuit court, October term, 1874.

"The parties to the above cause make the following agreement:

"The defendant agrees, by her attorneys and officers, to at any time enter the appearance of the defendant to an action to be instituted by the plaintiff (the state of Indiana), in the superior court of Marion county, for the recovery of any money which may be due the state or the school fund of the state, under and by virtue of the said company's charter of January 26, 1847, and the amendments thereto. In consideration of which said agreement, the plaintiff, by her attorneys and proper officers agrees to suspend further prosecution of said action now pending in the Owen circuit court until the final determination of such action so as aforesaid to be instituted for the recovery of money; and if in said last named action the defendant shall prevail, then the said plaintiff agrees to dismiss said suit in the said Owen circuit court, and if the said plaintiff in the said action to be instituted for money shall prevail, the said action in the Owen circuit court shall be dismissed only when the defendant shall have satisfied the judgment so obtained in the latter action for money; but nothing herein shall be so construed as to compel the dismissal of said suit in the Owen circuit court until said action so to be instituted shall have been finally tried upon the issues joined between the parties, or it shall be found in framing the issues, and determined by the court, that no right of action exists in favor of the state or the school fund. And it is further agreed that the agreed statement, which was prepared to be and which was in part used in the trial of said cause in the Owen circuit court, may be used as evidence without objection so far as the same may be competent, in the suit to be brought by the state against said company.

"It is further agreed that either party may withdraw the depositions on file in the Owen circuit court in said cause, and may read the same, so far as the same in their subject-matter may be found competent. And that this may be done notwithstanding any order of the Owen circuit court suppressing the same: Provided, The party so using any such depositions shall cause the same to be filed in the court where the case may be pending twenty days before the day for which said cause is set for trial; but this agreement shall not be construed to prevent either

party from taking additional depositions of the same or other witnesses.

"And it is agreed that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the state or school fund of the state from said old company or companies (by whatsoever name or names), under and by virtue of said charter and amendments thereto and the law and facts as applied thereto, then, and in that case, the company as now organized shall pay such amount, and judgment shall be rendered in said action for money, for the sum that may be found due.

"Nothing herein contained shall be construed to prevent the defendant from setting up any defense which existed in behalf of said old company prior to the surrender of said old charter.

"Indianapolis, October 5, 1874.

"J. C. Denny,
"Attorney General, Indiana.
"The Terre Haute and Indianapolis Railroad Company,
"By W. R. McKeen, President.
"R. W. Thompson,
"C. F. McNutt,
"Thos. R. Cobb,
"Attorneys for T. H. & I. R. R. Co.

"This agreement made by the attorney general (with the concurrence of his associate counsel, as we understand) we approve.

"October 5, 1874.

"Thomas A. Hendricks, Governor.
"Leonidas Sexton, Lieut. Governor."

"Defendant says that prior to the execution of this agreement, to-wit, on January 17, 1873, it had filed in the office of the secretary of state of the state of Indiana its acceptance of an act of the general assembly of said state, approved May 11, 1852, and entitled 'An Act to provide for the incorporation of railroad companies,' and ever since the filing of said acceptance this defendant has been and still is existing and acting as a corporation under the general laws of the state of Indiana concerning railroad companies.

Defendant says that at the time the agreement hereinbefore

set forth was executed, and during all the period that elapsed between the institution of said suit in the Putnam circuit court and the execution of said agreement, the state of Indiana, plaintiff herein, was claiming that under the provisions of the charter of January 26, 1847, this defendant was required to pay to the treasurer of state, for the use of the common schools of said state of Indiana, a portion of its surplus profits, and that there was a large sum due from said company to the state of Indiana, plaintiff herein, for the use of its common schools, but this defendant always denied any and all such liability and indebtedness and continuously refused to pay anything on account thereof.

Defendant says that pursuant to the agreement hereinbefore set forth, the state of Indiana, plaintiff herein, on the 28th day of May, 1875, instituted a suit for the recovery of money, against this defendant, in the superior court of Marion county, Indiana, such suit being brought on the relation of the then attorney general of said state of Indiana. And thereupon this defendant, pursuant to the terms of said agreement, entered its appearance to said suit, and on the 18th day of June, 1875, filed its demurrer to the complaint therein. And on the 6th day of March, 1876, said demurrer was sustained; thereupon the state of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9, 1876, by said superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken by the state of Indiana to the general term of said superior court, and on May 29, 1876, said judgment was affirmed, and thereupon said state of Indiana appealed to the supreme court of said state, and on such appeal the judgment aforesaid of the Marion superior court was affirmed.

And defendant says that the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein, and that said judgment of March 9, 1876, was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the state of Indiana against this defendant for the payment by defendant of any portion of its profits to the treasurer of state for the use of the common schools of the state of Indiana, under the said act of January 26, 1847, and the acts amendatory thereof and of all matters connected with or in any way referring to the claim of the state of Indiana for an accounting with, or the pay-

ment by this defendant to said state of Indiana, for the use of its common schools, of any portion of the profits or earnings of defendant under the terms of said original charter, or of the acts amendatory thereof.

Defendant says that the state of Indiana, plaintiff herein, and the relator herein were fully advised of all the foregoing facts prior to the regular session of the general assembly of said state in 1897; that the bringing of said suit in the Putnam circuit court, the trial and pendency of said suit in the Owen circuit court and the execution of the agreement hereinbefore set forth, between said state and this defendant, were all reported to the governor of said state of Indiana by the attorney general thereof, and said report of the attorney general was by said governor submitted with his message to the general assembly of said state at its regular session in 1875, and the bringing of said suit in the Marion superior court, and the decision and judgment aforesaid rendered by said court in said suit in favor of this defendant, were likewise reported by the attorney general of said state to the governor thereof, and said report was submitted by said governor with his message to the general assembly of said state at its regular session in 1877.

Defendant says that notwithstanding these facts, the general assembly of the state of Indiana, at its regular session in 1897, at the suggestion and under the advice of the relator herein, passed, and the governor of said state approved, the four several acts of 1897, to which reference is made in the complaint herein, and that by the passage of said acts and by the prosecution of this action, the state of Indiana, the plaintiff herein, and the relator, the attorney general thereof, were and are wrongfully seeking to vacate and annul said judgment of March 9, 1876, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1897 under the provisions of its original charter and the acts amendatory thereof, and to take this defendant's property for public use without just compensation, and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of the state of Indiana and the relator herein are in violation of section 10 of article 1 of the constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution." Rec. 47.

"Paragraph 11. That each and all of the alleged fraudulent acts and doings of this defendant set forth in the complaint

herein were known to the state of Indiana, plaintiff herein, and to its attorney general, more than twenty-five years ago, and prior to 1872 the said plaintiff filed against this defendant in the circuit court, in and for the county of Putnam and state of Indiana, an information, seeking a forfeiture of the charter of this defendant because of certain alleged acts and doings of the defendant set forth in said information, which acts and doings so set forth were and are identical with the acts and doings set forth in the complaint herein, and upon which plaintiff now bases its right to recover herein; that said action was taken on change of venue to the circuit court in and for the county of Owen and state of Indiana, and a trial thereof, which was had in the year 1874, resulted in a disagreement of the jury; that thereupon the plaintiff herein abandoned the further prosecution of said action, and on the 28th day of May, 1875, instituted a suit against this defendant in the superior court of Marion county, Indiana, to recover money which it was alleged was due to the state of Indiana from the defendant under the terms of defendant's charter set forth in the complaint herein; that the complaint in this last named suit set forth each and all of the alleged fraudulent acts and doings of this defendant exactly as the same were set forth in said information and are set forth in the complaint, to which this is an answer, and in said last named suit the said state of Indiana based its claims to recover the money alleged to be due to it from this defendant, upon the same identical allegations that are stated as a basis for recovery in the complaint to which this is an answer; that on the 18th day of June, 1875, defendant filed its demurrer to the complaint in the suit aforesaid, and on the 6th day of March, 1876, said demurrer was sustained, and thereupon the state of Indiana, plaintiff in said suit, failed and refused to amend the complaint therein and elected to stand by said complaint, and thereupon final judgment was rendered March 9, 1876, by said Marion superior court in this defendant's favor.

Defendant says that from this judgment an appeal was taken to the general term of said superior court, and on May 29, 1876, said judgment was affirmed, and thereupon said state of Indiana appealed to the supreme court of said state, and on such appeal the judgment aforesaid of the Marion superior court was affirmed, and from this last affirmance of said judgment until the bringing of this action, the said state of Indiana fully acquiesced in the decision rendered as aforesaid in this defendant's favor by the superior court of Marion county and took no steps what-

ever to assert any claim against this defendant, nor to enforce the collection of any such claim in any manner whatsoever.

Defendant says that in the year 1887 a majority of all its outstanding capital stock was sold by the then holders of it to purchasers in good faith, who paid full value therefor without notice or knowledge of any kind whatsoever that the state of Indiana had or pretended to have any claim against this defendant, based upon the old charter of 1847, which said charter, together with all the amendments thereof this defendant surrendered in 1873, and the said state of Indiana accepted the surrender thereof without asserting or reserving the right to assert any claim against this defendant because of any of its acts and doings during the time said charter was in force and effect.

Defendant further says that in August, 1893, a controlling interest in the whole capital stock then outstanding of this defendant was again sold for full value to purchasers in good faith, who bought and paid for the same without notice or knowledge of any kind or description that the plaintiff herein claimed any right whatever to recover anything from this defendant, because of any money due to the state of Indiana under the terms of the charter set forth in the complaint herein, and the last purchasers of said controlling stock still hold the same, and the value thereof, together with the value of all the rest of the capital stock of this defendant, will be greatly reduced, if not destroyed, should the plaintiff herein be permitted to enforce the claim now set up by it against this defendant in the complaint herein.

Defendant further says that, relying upon the acquiescence of the state of Indiana in the judgment aforesaid, rendered in this defendant's favor by the said superior court of Marion county, defendant largely extended its operations, and has handled its property and funds and incurred large obligations, believing that it had a perfect right so to do, without being called upon to account for or pay over any of its profits made prior to the year 1873 to the state of Indiana, and should this defendant now be compelled to account for and pay over to said state of Indiana the profits now claimed in this action, it would work a great and irreparable injury to this defendant and its stockholders, and render it unable to perform its obligations or carry on its business.

Defendant says that all the matters and things herein set forth are well known to said state of Indiana, and in anticipation of this defendant's inability to pay the claim now sought to be en-

forced in this suit, the general assembly of the state of Indiana, at its regular session in 1897, authorized the purchase, at judicial sale, of this defendant's property, and directed the governor of said state, with the concurrence and consent of the secretary of state and auditor of state, to designate and appoint the proper officers to take charge of and operate said property, or to lease the same until provision should be made by the general assembly for the disposition of said property.

Defendant says that notwithstanding the premises, the said state of Indiana, plaintiff herein, and the relator, the attorney general of said state, are now wrongfully seeking to vacate and annul said judgment of the superior court of Marion county, and to destroy the vested rights of defendant in and to its property, earnings and profits acquired previous to 1873 under the provision of its original charter, and the acts amendatory thereof, and to take this defendant's property for public use without just compensation, and to deprive this defendant of its property and the enjoyment thereof without due process of law, all of which acts and doings on the part of said state of Indiana and said relator are in violation of section 10 of article 1 of the Constitution of the United States, and of article 5 and of section 1 of article 14 of the amendments to said constitution.

Defendant further says that all the persons who, either as directors or other officers, or agents, managed and controlled its affairs for the first twenty years of its existence died before the commencement of this action, as did also many of those who controlled and managed its affairs between 1867 and 1877, and defendant is, therefore, unable to properly defend against the alleged wrongs set forth in the complaint herein, and may be wholly prevented from making successful defense in this action by reason of its inability to procure the testimony of those persons who controlled and managed its affairs as aforesaid, and who died previous to the commencement of this action, and previous to any assertion on the part of the state of any right whatever to recover any part of the profits earned by this defendant in the operation of its railroad prior to 1873.

Defendant further says that ever since the judgment, rendered in its favor as aforesaid by the superior court of Marion county, was affirmed by the supreme court of Indiana, the said state of Indiana, plaintiff herein, has, with full knowledge of all the facts, permitted this defendant to deal with its railroad and the earnings and profits thereof, under the belief always entertained by this defendant that said judgment was recognized by said state of Indiana as being a final settlement of all questions

concerning said state's claim to any part of the profits earned by this defendant in the operation of its railroad under the charter aforesaid of 1847, as originally granted, or afterwards amended; and defendant says that for twenty years said state of Indiana took no steps whatever to impeach said judgment and prior to the bringing of this action neither claimed nor pretended that it had any right so to do, or to assert that in the proceedings which resulted in said judgment the right of said state of Indiana to recover from this defendant any part of the profits earned in the operation of said railroad were not fully presented and adjudicated." Rec. 58.

The court sustained a demurrer to the foregoing defense. Rec. 63.

The issues joined were upon the complaint, the first, third and ninth paragraphs of the answer, and the replies in denial to the third and ninth paragraphs of answer. Upon the closing of the issues the case was referred to Noble C. Butler, as master commissioner, to hear and report to the court the evidence, with his findings of fact and conclusions of law. Pursuant to this order he reported the evidence and his finding that the plaintiff was not entitled to recover any thing from the defendant. Rec. 68. Exceptions were filed to this report by the plaintiff and also by the defendant, and the cause was submitted to the court for final decree upon the master's report, the evidence taken and returned by him with his report as part thereof, and the exceptions to the report. The court passed upon the various exceptions to the master's report and rendered judgment in favor of the state for $913,905.01. Rec. 104. The computation by which the court arrived at this sum is shown at pages 101-103 of the record.

The bill of exceptions contains the master's report, all of the evidence accompanying it, upon which the cause was tried and determined, the exceptions filed by the plaintiff and the defendant respectively to the report, the rulings of the court on these exceptions, and preserves the exceptions taken to those rulings. It begins on page 109 of the record and ends on page 642. The facts are not disputed.

The complaint admits that the legislature never regulated the

tolls and freights and never called for a statement of the expenditures, expenses or profits of the company. As excuse therefor it alleges that the company, prior to the surrender of its charter in 1873, bribed the legislature and made false and fraudulent representations concerning its investments and earnings, and that these fraudulent acts "were done by the defendant company for the purpose of keeping concealed from the State and the general assembly the knowledge that the time and situation had arrived upon which the State could and should interpose to regulate the tolls and freights of the defendant company, and that by the acts and doings of the defendant company the said defendant did deprive the State from ascertaining and knowing that the profits realized exceeded the cost of said railroad to the stockholders, and ten per centum per annum interest thereon, and did thereby prevent the State and the general assembly thereof from obtaining the knowledge and information necessary to place it in a condition in which it could interpose to regulate said tolls and freights, and that but for said fraudulent acts of said defendant company the general assembly of the State should have interfered and regulated the tolls and freights of said company, as it was authorized to do by the terms and provisions of said charter, and would have made provision requiring the payment of the excess over and above the fifteen per centum per annum permitted to be divided among its stockholders, to be paid to the treasurer of state for the use of common schools." Rec. 12.

Upon this subject the master made the following finding: Rec. 85.

"The complaint makes divers and sundry charges of actual and positive fraud against the corporation and its officers and directors. These charges are not sustained by the evidence. It does not appear from the evidence that the corporation either directly or indirectly misrepresented any facts to the State, or wilfully concealed any facts from the State, or was guilty of any fraudulent acts or omissions which misled the State in any way."

The court found that "the master was warranted in finding that the evidence did not make a case of fraud." Rec. 100.

The opinion of the Supreme Court of Indiana affirming the judgment of the Superior Court of Marion county is reported in 159 Ind. 438; 65 N. E. 401, and is printed at p. 652 of the record.

The company's charter was perpetual, and not subject to amendment or repeal. Section 36 originally reserved that right, but it was repealed, before the company began operations, by section 7 of the act approved February 16, 1848, and thereafter the charter was not subject to alteration or repeal.

ASSIGNMENT OF ERRORS.

The following statutes of the State of Indiana are repugnant to the contract clause of the Constitution of the United States (section 10, article 1), and to section 1 of the Fourteenth Amendment, viz: the act approved January 27, 1897, the act approved February 18, 1897, the act approved February 24, 1897, and the act approved March 4, 1897.

The judgment under review gives effect to these statutes, deprives the plaintiff in error of property without due process of law, denies to it the equal protection of the laws, destroys its vested rights, and impairs the obligations of its contracts with the State under its charter and under the surrender thereof on January 17, 1873.

ARGUMENT.

I.

The Federal Questions were raised properly and in due time.

The immunities claimed by the company under the Constitution of the United States were properly and specifically presented in the State court, first, by the demurrer to the complaint (Rec. 36) and, when that was overruled, by paragraphs 2, 3 and 11 of the answer (Rec. 47, 50, 60), and were preserved by proper assignments in the Supreme Court of Indiana, and by an assignment of errors annexed to and returned with the writ of

error issued by this court, in compliance with Rev. Stat. U. S. sec. 997. Rec. 687.

II.

In determining whether the legislation of 1897 impairs the obligation of prior contracts between the company and the state, this court will construe the contracts for itself, and will determine the effect thereon of the subsequent legislation.

In Yazoo & Mississippi Railroad Company vs. Adams 180 U. S. 41, 44, Mr. Justice Brown said:

"There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the Supreme Court of the State."

In Citizens Bank vs. Parker, 192 U. S. 73, 85, Mr. Justice McKenna said:

"When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that would surrender the power of review."

These cases only recognize and enforce the well settled rule of this court declared in many earlier cases. They are referred to by Mr. Justice Jackson in Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, at p. 492 et seq.; by Mr. Justice Brewer in McCullough vs. Virginia, 172 U. S. 102, at p. 109, and by Mr. Justice Shiras in Wilson vs. Standefer, 184 U. S. 399, at pp. 411, 412.

In Chapman vs. Goodnow, 123 U. S. 540, 548, Chief Justice Waite said:

"If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to, and the right directly refused."

To the same effect is Grand Rapids & Indiana Railway Co. vs. Osborn, 193 U. S. 17.

III.

The Statutes of 1897 are all repugnant to the Constitution of the United States.

By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive. The only right to call for such a statement was under a charter of which the State had accepted an unconditional surrender twenty-four years before.

The second act passed February 18, 1897, undertook to amend the statute under which the company had surrendered its charter and had acquired vested rights, twenty-four years before, and the third, passed February 24, 1897, undertook to revive and amend section 23 of the charter of 1847, which never was subject to amendment, and which, moreover, had been surrendered twenty-four years before. The extent to which these two statutes impair the obligation of contracts and the ruthless manner in which they undertake to destroy vested rights is best disclosed by placing the original sections and the amendments in parallel columns:

Section 36 of the general railroad law as it existed when the company surrendered its charter, January 17, 1873.	The Section as amended February 18, 1897. The proviso is new.
"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company.	"Sec. 36. All existing railroad companies may acquire all the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an

The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized; and, thereupon, said company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified as fully as they would have had and been if organized under this act: Provided, however, That whenever any railroad, organized under any special charter granted by the State of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, *whether inchoate or complete*, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said state, notwithstanding such acceptance, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and notwithstanding such acceptance, any and all provisions of said charter may be amended, revised, repealed or added to *as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May* 11, 1852."

Section 23 of the Charter of 1847.

"Sec. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a divi-

Section as amended February 24, 1897.

"Sec. 23. That when the aggregate amount of dividends declared *or earned* received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road, with ten per cent. interest per annum thereon, the general assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road, shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights

dend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the general assembly, from time to time, whenever required, with correct statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate amount of the dividends declared shall amount or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits, after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies, shall be semi-annually, on the first Monday in July and December of each year, paid over to the treasurer of state for the use of common schools. And the general assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said treasurer of state for the use of said schools, and whenever said general assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the state. *And the right of the state* upon any such in-

> quiry or upon any suit that may be authorized to compel such accounting *shall be the same as though this amendment had been originally a part of the charter of said railroad and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the state:* Provided, however, That nothing in this act contained shall be in anywise construed as lessening, impairing or releasing in any manner any right of or any liability to the state of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said state as fully as though this section had not been amended.'

Having thus declared ex post facto that the company's surrender of its charter in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded, by the fourth and last act of the series, to deal with the surplus profits of the company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose" (sec. 1), and the attorney general was directed to sue for their recovery.

By section 36 of the original charter the legislature reserved "the right to alter or amend this charter at any time, and to repeal the same, whenever its provisions shall have been violated by said company" Rec. 22. Before the company had taken any action under the charter, this section (36) was repealed by section 7 of an act approved February 16, 1848 (Local Laws, 1848, p. 530), and thereafter the charter was not subject to amendment, alteration or repeal.

IV.

The effect given to the legislation of 1897, by the judgment under review, is to create rights in favor of the state, and to impose obligations upon the company, and not merely to provide a remedy for pre-existing causes of action.

This proposition results from two propositions established by the decision of the Supreme Court of Indiana, and declared in its opinion; (1) that the State had no cause of action when the company surrendered its charter on January 17, 1873 (Rec. 668, 669, 672), and (2) that further action on the part of the *legislature* was necessary to give the state a cause of action. Rec. 672. The court announced these propositions in holding that the judgment of 1876 was not a bar to the present suit, for the reason, among others, that the State had no cause of action in 1875, when that suit was instituted. The court said "No duty rested upon the corporation to pay any sum to the treasurer of State, and no right of action rested in the State for the recovery of money, with or without a demand. The duty to account when required, as imposed by section 23, means nothing more or less than the duty to settle, and pay over to the treasurer of State any surplus disclosed when requested or demanded *by the legislature* to do so. * * * We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the general assembly. This request was not made until 1897, and *no actionable default by appellant had occurred prior to that date.*" Rec. 668, 669.

Again,

"When the attorney general commenced the suit of 1875 the State had no right of action against appellant, and whether it ever did have a right to sue, depended upon the refusal of appellant to account when requested to do so by the legislature." (Rec. 672).

And in refusing to give effect to the judgment in that action, on the ground that it was not an adjudication on the merits, the court says:

"There can be no merits where there exists no cause of action." Rec. 672.

But if the State had no cause of action in 1875, which was two years after the company had surrendered its charter unconditionally and without reservation; if nothing was due to the State at that time, because no default on the part of the company had then occurred, the effect necessarily given, by the judgment under review, to the legislation of 1897 is not merely to provide a remedy, but to impose an obligation and create a right. And this follows notwithstanding the disclaimer of the Supreme Court of Indiana, and the statement in its opinion that the legislation of 1897 "is appealed to only as providing a remedy for enforcing the pre-existing charter obligations of appellant," and that "to this extent it is valid." Rec. 655. A contingent liability which can only ripen into an obligation as the result of future *legislation*, which may or may not take place, is not a present obligation, and the legislation which converts it into an obligation can not be regarded as providing a remedy only. To perfect an obligation is the same thing as to create it, for there can be no obligation in the absence of an element essential to its existence. There is only a contingent or inchoate right or liability, which may never ripen into a real right or obligation.

In Bass vs. Roanoke Navigation and Water Power Co., 111 N. C. 439, 449, the court said:

"A claim contingent upon action by the legislature or by the executive department of the State, which may never be taken, would seem clearly so remote and uncertain as to fall under the denomination of an expectancy, subject to destruction by the power which alone could create the contingency, or could refrain from doing so at its pleasure."

The distinction between a statute, which provides a remedy only, and one which imposes an obligation, is considered by the Supreme Court of Ohio in Commissioners vs. Rosche Brothers, 50 Ohio St. 103, 112, which was a suit under a statute authorizing the recovery of taxes, voluntarily paid, on property which was not subject to taxation. The court held the statute uncon-

stitutional on the ground that it imposed an obligation on the county for past transactions where none existed at the time the taxes were paid. The court said, p. 112:

"When the defendants in error voluntarily, though erroneously, listed their property, and voluntarily paid the taxes assessed upon it, neither by statute nor by any principle of the common law as administered in Ohio, was an obligation imposed upon the county of Hamilton to refund the money received. If such an obligation had existed, the forms of procedure then provided by our system of practice, were ample to afford complete relief. The obstacle in the way of the defendants in error was not inadequate methods of procedure, but the absence of a law vesting in them a right of recovery. This want the statute under consideration attempted to supply.

This statute, it is contended, is remedial, and remedial statutes may be retroactive. It is remedial no doubt, in that enlarged sense of that term, where it is employed to designate laws made to supply defects in, or pare away hardships of, the common law, but not remedial in the sense of providing a more appropriate remedy than the law before afforded, to enforce an existing right or obligation. The statute under consideration provided no new method of procedure; it simply imposed upon Hamilton County an obligation towards these plaintiffs in error that did not attach to the transaction when it occurred. In attempting to accomplish this result the legislature transcended its constitutional powers."

And again, at p. 111:

"Judge Story defines a retrospective, or retroactive law, as follows: 'Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.' The Society, etc. vs. Wheeler, 2 Gall. 104-139. This definition was approved by this court in Rairden et al. vs. Holden, 15 Ohio St. 207. It was also adopted by the Supreme Court of the United States in Sturges vs. Carter, 114 U. S. 511."

The distinction between a statute which provides a remedy and one which creates a right, and the necessity for legislation of the latter sort in order to make this company liable to the

State, is pointed out in the message of the relator to the general assembly of Indiana, with which he inaugurated his campaign of confiscation. On January 25, 1897, he laid before the house of representatives of the general assembly of Indiana, a communication in writing, which is printed at pages 300-306 of the house journal of the session of 1897. It refers to the original charter, the quo warranto proceedings in the Owen Circuit Court, the joint resolution of March 10, 1873, the suit in the Superior Court of Marion County instituted in pursuance thereof in 1875, and the judgment in favor of the company in that case. Concerning the complaint in that suit he says (p. 303):

"In the complaint heretofore referred to, it is alleged in the first and second paragraphs that there was due to the State a million and a half of dollars; in the third paragraph it is alleged that there was one hundred thousand dollars due to the State for moneys illegally demanded and received for the transportation of troops, munitions of war. As to the third paragraph, I think the adjudication is probably a complete bar; as to the first and second paragraphs I think it probable that the adjudication is a bar to any further action, unless the general assembly shall by antecedent legislation make a case different from the one presented then, and to do that successfully will require the exercise of wise legislative discretion."

The report concludes: "I beg to urge that hearty co-operation between the two houses to adopt the much needed legislation, without which nothing can be done" p. 306.

It is thus evident that what the attorney general proposed was not to provide a remedy for an existing cause of action, but to make a new case "by antecedent legislation." He uses the expression "a case different from the one presented then" [1875], but he knew that the State had no case in 1875, as the court had decided. The "difference" with which he was confronted was between no case and a good case, and the problem was to supply the latter by "wise antecedent legislation," "much needed legislation." This the house proceeded to do without delay. It suspended the rules and on the same day passed the act which the attorney general had submitted with his re-

port, solemnly reciting, in the face of the surrender of the company's charter and the adjudication of 1876 in its favor, that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana," etc.

The legislation of 1897 was not necessary to provide a remedy.

If the company was indebted to the State when the foregoing act was passed, or at any time between January 17, 1873, when it surrendered its charter, and 1897, the attorney general had ample authority to sue for the debt. The legislation of 1897 was not necessary for that purpose. The Superior Court so held in overruling the demurrer to the complaint in the case at bar, saying, Rec. 42:

"It is claimed by the State that the judgment in said cause is void, for the reason that the attorney general, who as relator instituted the suit, had no authority to do so, and that having no authority, the court acquired no jurisdiction over the State so as to make the judgment binding on the State.

The contention is that the attorney general had no authority of his own motion to move in the matter, but that he must first be required to appear either by notice from the clerk of the court in which the suit was pending or by authority in writing from the governor or from a majority of the state officers, and that in no other way could he acquire authority to represent the State in such suit. To this contention we do not assent. Section 5668 R. S. 1881, provides that it shall be the duty of the attorney general to cause suit to be instituted to recover money due from any source where the same is required by law to be paid to the State or any officer in trust for the State.

Under this section it has been held that the attorney general was the proper relator to sue for money due to the common school fund. Board vs. The State, 92 Ind., 353. There are numerous other cases in our state reports where the attorney general has appeared as relator in suits to recover money due to the school fund. While true, in these other cases the question was not raised as to the right of the attorney general to appear as relator, yet they are examples as to what has long been the practice in this state. Our conclusion therefore on this point, is that the attorney general had authority to appear as relator in such suit."

The Revised Statutes of 1852, p. 146 (carried into the Revision of 1881 as section 5611, and in force at all times after May 6, 1853, up to the present time) thus defined the duties of the auditor of State.

"He shall—

* * *

Sixth. Institute and prosecute, in the name of the State, all proper suits for the recovery of any debts, moneys, or property of the State, or for the ascertainment of any right or liability concerning the same.

Seventh. Direct and superintend the collection of all moneys due to the State, and employ counsel to prosecute suits, instituted at his instance, on behalf of the State."

The act of March 10, 1873, p. 18, carried into the Revision of 1881 as section 5668, and in force at all times after March 10, 1873, up to the present time, contained the following provision with respect to the attorney general of the State.

"It shall be the further duty of the attorney general to ascertain, from time to time, the amounts paid to any public officer of the State or any county officer or other person, for unclaimed witness fees, court docket-fees, licenses, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source where the same is, by any law, required to be paid to the State or to any officer in trust for the State; and in all cases where the officers whose duty it shall be to collect the same shall fail, neglect or refuse, for twelve months after the cause of action in favor of the State shall have accrued, or shall fail, neglect, or refuse to sue for and proceed to recover any property belonging to or which may escheat to the State, the said attorney general shall institute, or cause to be instituted and prosecuted, all necessary proceedings to compel the payment of or recovery of any such property."

In State, ex rel. Atorney General vs. Denny, 67 Ind. 148, 159, the Supreme Court, construing the foregoing statute, said:

"It is the true intent and meaning of this supplemental act, as we construe its provisions, that the attorney general of this State shall be and is thereby authorized to collect at once, with or without suit, all amounts paid to any public officer of the

State, or any county officer or other person, and not paid by such officer or person into the proper treasury as required by law, for unclaimed witness fees, court docket fees, license, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, and all amounts due from any other source, where the same was, by any law, required to be paid to the State, or any officer in trust for the State: except as to fines, forfeitures, and property escheating or belonging to the State, which he may not collect with or without suit, or sue for the recovery of, until after the expiration of one year from the time the cause of action has accrued therefor, and then only in the event that the proper prosecuting attorney has failed, neglected or refused, for and during the said year, to collect the same, or to institute proceedings for the recovery thereof."

In Carr vs. State ex rel. Attorney General, 81 Ind. 342, the court at p. 347 quotes the foregoing passage from the opinion in State vs. Denny, and says:

"With this construction we are content to abide. It permits the attorney general, as from time to time he may ascertain that there is proper cause for it, to bring suits in behalf of the State, though he is not required to sue, except in cases where other officers whose duty it shall be to collect or sue shall fail or refuse to act for twelve months after the cause of action in favor of the State shall have accrued. We perceive no reason for saying that there is any inconsistency between this act, which confers upon the attorney general power to collect and to sue, and the previous acts referred to, which conferred similar powers on other officers. They may well stand all together, and whichever officer first institutes a suit will have the precedence."

In Board vs. State, 92 Ind. 353, the court held that the attorney general was the proper relator to sue for money due to the common school fund.

The following joint resolution of July 7, 1873, Acts of 1873, p. 245, was carried into the Revision of 1881 as section 5672, and into Burns' Revision of 1901 as section 7701, and has been in force from July 7, 1873, to the present time:

"The attorney general is hereby authorized, directed and re-

quired to take charge of, conduct, prosecute, discontinue or dismiss, and have control of, any and all suits and proceedings now pending or which may hereafter be instituted in the name of the State of Indiana, on the relation of the State of Indiana, by any prosecuting attorney against any and all railroad companies or corporations in the nature of a quo warranto, or otherwise, and to adjust, settle or compromise any and all claims the State may have against such company or corporation, in such manner and on such terms as he may think proper, and receive payment of such claim in money, bonds, stocks or mortgages, which money, bonds, stocks or mortgages shall by such company or corporation, be paid over to the treasurer of State, under the direction of the attorney general. Provided, That any suit or suits now pending, or which may hereafter be brought, shall be dismissed, adjusted, settled or compromised, whenever the same shall be directed, in writing, by the governor and lieutenant-governor, and upon such terms and conditions as they shall direct."

In United States vs. San Jacinto Tin Co., 125 U. S. 273, 278, Mr. Justice Miller said:

"It is denied that the attorney general has any general authority under the Constitution and laws of the United States to commence a suit in the name of the United States to set aside a patent, or other solemn instrument issued by proper authority.

It is quite true that the Revised Statutes, in the title which establishes and regulates the Department of Justice, simply declares, in section 346, that "there shall be at the seat of government an Executive Department to be known as the Department of Justice, and an attorney general, who shall be the head thereof." There is no very specific statement of the general duties of the attorney general, but it is seen from the whole chapter referred to that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the government. There is no express authority vested in him to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits, and all the district attorneys who do

bring them in the various courts in the country are placed under his immediate direction and control. And notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we can not believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government."

The legislation was necessary to create a cause of action.

We have shown that the legislation of 1897 was not necessary to provide a remedy. It was necessary for the purpose of creating a right in favor of the State and of imposing an obligation on the part of the company, and was so treated by the Supreme Court of Indiana. What was lacking prior to 1897, in the view of that court, was not a mere demand on the company by the executive department of the State to pay a debt, due but payable only on demand, for the opinion says that in 1875 "no right of action rested in the State for the recovery of money with or without a demand" (Rec. 668). The opinion declares further that whether the State would have a right to sue in the future depended altogether upon the will of the legislature (Rec. 672). In other words, according to the decision of the Supreme Court of Indiana, the State reserved the power under the charter of 1847 to impose a liability upon the company by future *legislation*. But that power existed only so long as the charter remained in force, and fell with its surrender. The legislature could not impose a liability under a charter which had been surrendered by agreement, none existing at the time of the surrender, and the right to impose it not being reserved.

Suppose the State had repealed the charter prior to 1873 with the consent of the company and without reservation (which was the effect of the surrender of 1873); could the legislature twenty-four years, or a hundred years, or a thousand years

afterwards, exercise a power existing only under the charter, and not reserved in the repeal? When the legislature, by the act of January 27, 1897, called upon the company to render an account of its receipts, expenses and profits from 1847 to January 17, 1873, as a foundation for the subsequent proceedings, there was no law or charter in force authorizing such action. All authority under the charter of 1847 had expired, and the legislature had no more right to call for a statement of this company's earnings and profits, for the purpose of taking steps to appropriate them, than to call for a similar statement of the earnings and profits of a private citizen.

V.

The power of the legislature to make the company liable for past earnings expired when the company surrendered its charter and the state accepted the surrender, without reserving any rights.

When the company surrendered its charter it owed nothing to the State, and might never owe anything. Even if the charter remained in force, it would become indebted to the State only in the event that the legislature should see fit to pass an act requiring it to account. There was no present debt or fixed liability, but only power under the charter to *legislate* in the future so as to impose a liability. This is clear upon the construction which the Supreme Court of Indiana has put upon the charter. Could the legislature exercise that power so as to impose a liability, after the State had accepted an unconditional surrender of the charter?

The effect of the surrender is disposed of by the Supreme Court of Indiana in three lines, with the statement that "the acceptance in 1873 of the general railroad law of 1852 had no effect in relieving the appellant from unperformed duties, assumed in its charter contract of 1847." Rec. 673, 674. But there were no unperformed duties when the company surrendered its charter, as we have abundantly shown by quotations from the opinion of the court, nor any liability of any sort, but at most a right on the part of the State to impose a liability by

future legislation, a right which was not reserved in accepting the surrender of the charter, and which therefore expired when the charter became defunct.

The surrender of the charter was equivalent to its repeal, with the consent of the company; and the well settled rule is that the repeal of a statute, without a saving clause, takes away all powers which depend upon the statute, that have not been exercised and are not reserved. The rule is thus stated by text writers:

"Rights depending on a statute, and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute." Sutherland, Stat. Cons. Sec. 163.

"The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed." Sutherland Stat. Cons. Sec. 162.

"A statute repealed by a later act is, in the absence of provisions to the contrary, considered, as to its operative effect, as if it had never existed, except as to matters and transactions past and closed." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 745.

"The repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it, while it leaves unimpaired those which either have become vested, or, though connected with it, have an independent existence." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 747.

"The naked repeal of a statute conferring a power or privilege destroys the right to exercise it, and abates suits pending to enforce it." 26 Amer. & Eng. Ency. of Law, 2d Ed. p. 752.

"Where an act expires or is repealed, it is, as regards its operative effect, considered, in the absence of provision to the contrary, as if it had never existed, except as to matters and transactions past and closed. As to all future matters, all steps yet to be taken, the repealed statute upon which they are based, is treated as utterly obliterated." Endlich, Interp. Stats. sec. 478.

"The same rule applies to rights and remedies founded solely

upon statute, and to suits pending to enforce such remedies." Endlich, Interp. Stats. sec. 480.

"If by virtue of some statute a right becomes vested upon the completion of some certain transaction, but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is complete." Hardcastle, Stat. Law, 3d ed. 374.

In Robison vs. Beall, 26 Geo. 17, 32, Benning, J., said:

"When the charter of a corporation expires, all things which owe their existence to the charter expire too, unless there is some special law to prevent them from doing so."

In Moor vs. Seaton, 31 Ind. 11, 13, the court said:

"Inchoate rights generally, derived under a statute, are lost by its repeal unless saved by express words in the repealing statute."

In Surtees vs. Ellison, 9 B. & C. 750, 752, Lord Tenterden, Chief Justice, said:

"It has been long established, that, when an act of parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature."

In Kay vs. Goodwin, 6 Barg. 576, 582, Chief Justice Tindal said:

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the parliament as if it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

In Miller's Case, 1 W. Bl. 451, which is one of the earliest, Miller instituted proceedings to be discharged under the insolvent debtor's act, but before he had finally established his right and obtained his discharge, the statute was abolished without a saving clause. The court held that his right to a discharge and the jurisdiction of the court to grant it, fell with the repeal of the statute.

There are many cases in this court in which the rule has been applied, where statutes imposing taxes, creating penalties, giving new rights of action, or conferring jurisdiction have been repealed. They recognize the principle that when a statute is repealed, without a saving clause, all contingent interests and inchoate rights, and all proceedings begun, which have not ripened into vested rights, fall with the repeal.

Yeaton vs. United States, 5 Cranch, 281, is the first of these cases. It was an appeal in admiralty from a sentence of condemnation for breach of the act of February 28, 1806, prohibiting intercourse with certain ports in the Island of St. Domingo. The act expired after the sentence of condemnation, but before the case was heard on appeal in this court. The court held that the case was to be heard here de novo as if no sentence had been passed, and that the expiration of the law relieved the vessel from liability. Chief Justice Marshall said p. 283:

"It has long been settled on general principles that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some provision be made for that purpose by statute."

The Schooner Rachel vs. United States, 6 Cranch, 329, was a similar case except that the vessel had been sold under the sentence of condemnation and the proceeds paid over to the United States, while the act was still in force. The court held that that circumstance made no difference and made a general order for restitution of the property condemned.

In Ex parte McCardle, 7 Wall. 506, 514, which involved the repeal of a statute conferring appellate jurisdiction on this court, pending the appeal, Chief Justice Chase said:

"The general rule, supported by the best elementary writers, is that 'when an act of the legislature is repealed it must be considered, except as to transactions past and closed, as if it never existed.'"

In Railroad Company vs. Grant, 98 U. S. 398, 401, Chief Justice Waite said:

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. United States vs. Boisdore's Heirs, 8 How. 113; McNulty vs. Batty, 10 Id. 72; Norris vs. Crocker, 13 Id. 429; Insurance Company vs. Ritchie, 5 Wall. 541; Ex parte McArdle, 7 Id. 5[illegible] The Assessor vs. Osbornes, 9 Id. 567; United States vs. [illegible]en, 11 Id. 88."

Gurnee vs. Patrick County, 137 U. S. 141, and In re Hall, 167 U. S. 38, are later cases to the same effect.

In Bank of Hamilton vs. Dudley's Lessee, 2 Pet. 492, the court held that an order of sale, entered by the court of common pleas of Hamilton County, Ohio, after the repeal of the statute which conferred power upon the court to authorize administrators to sell lands of their intestates for the payment of debts, was void. It was urged that the interest of the administrators in the real estate as trustees for the creditors was a vested interest which the repeal of the law could not divest, but the court held otherwise.

Clapp vs. Mason, 94 U. S. 589, involved an internal revenue tax. A testator died devising real estate to his widow for life with remainder over. The remainderman came into possession after the law authorizing the tax, which was in force at the death of the testator, was repealed. The court held that he could not be taxed, saying:

"It is manifest that the right [to the tax] does not accrue until the duty can be demanded, that is, when it is made payable" (p. 519).

To the same effect are Mason vs. Sargent, 104 U. S. 689, and Sturges vs. U. S. 117 U. S. 363.

Similar was the effect of the repeal or surrender of the charter of 1847, at a time when nothing was due from the company, and prior to any action on the part of the legislature looking to the creation of a liability.

The rule has been applied frequently to mechanics' liens given by statute, where the requisite proceedings to fix the lien have not been completed at the date of repeal. Bailey vs. Mason, 4 Minn. 546; Holcomb vs. Boynton, 151 Ill. 294; Bangor

vs. Goding, 35 Me. 73, 56 A. Dec. 688; Frost vs. Ilsley, 54 Me. 345; Wilson vs. Simon, 91 Md. 1; Hanes vs. Wadey, 73 Mich. 178.

In Steamship Company vs. Joliffe, 2 Wall. 450, a pilot had tendered his services under a statute of California which declared that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one half pilotage fees. After Joliffe had recovered a judgment under the statute, and the steamship company had taken the case to this court on writ of error, the legislature of California repealed the statute, and it was claimed in this court by the attorney general of California that "by reason of the repeal, the present action can not be maintained." His position was "that as the claim to half-pilotage fees was given by the statute, the right to recover the same fell with the repeal of the statute; and that this court must dismiss the writ of error on that ground." 2 Wall. 456.

Mr. Justice Miller, speaking for the minority, quoted the language of Chief Justice Tindal in Kay vs. Goodwin, 4 Moore & Payne, 341, heretofore quoted in this brief, and referred to many other cases in support of the view taken by three of the justices, that the plaintiff had acquired no vested right; but the majority held that a perfected quasi-contractual right had accrued to him prior to the repeal of the statute. Mr. Justice Field, speaking for the majority said, p. 457:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

The distinction between a vested right under a statute, which the repeal of the statute does not affect, and an inchoate or contingent interest, which falls with the repeal, is pointed out in two other cases in this court.

Aspinwall vs. Commissioners of County of Daviess, 22 How. 364, involved statutes of the State of Indiana which made it the duty of the board of county commissioners to subscribe for the stock of a railroad company if a majority of the qualified voters at an election determined in favor of the subscription. An election took place in 1849 at which a majority of the votes were cast for the subscription, but before the subscription was actually made, the new constitution of Indiana took effect requiring all such subscriptions to be for cash. This court held that the railroad company had acquired no perfected right or vested interest to a subscription by virtue of the statute and the election; that its contingent interest fell with the adoption of the new constitution; and that bonds issued in pursuance of the subscription, made after the new constitution took effect, were invalid.

Baltimore & Susquehanna Railroad Company vs. Nesbit, 10 How. 395, involved a condemnation statute of Maryland. The jury had assessed, and the court had affirmed, the damages, and all other steps had been taken, except the payment of the money, when the legislature passed another act. This court held that the company had acquired no vested right, saying, p. 399:

"Thus it appears that it is the payment or tender of the value assessed by the inquisition which gives title to the company, and consequently, without such payment or tender, no title could, by the very terms of the law, have passed to them."

So under the charter of 1847, as construed by the Supreme Court of Indiana, an act of the *legislature* requiring the company to account, was essential to the creation of a right on the part of the State, and to the fixing of any liability, such as the law recognizes, against the company.

In Lamb vs. Schottler, 54 Cal. 319, 323, it was held that an appraisement of water rights to be acquired by a board of commissioners, gave no right to proceed to the actual acquirement of the rights, after the repeal of the statute. The opinion quotes the statement of Tindal, C. J., in Kay vs. Goodwin, 4 Moore & P.:

"The effect of a repeal I take it to be to obliterate the statute as completely from the records of Parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those suits that were commenced, prosecuted and concluded while it was an existing law."

In Terry vs. Dale, 27 Tex. Civ. App. 1. An act permitting the purchase of land owned by the State was repealed. The plaintiff claimed the land on the ground that before the repeal he had entered into written obligations to take it and had remitted to the State treasurer a draft for the per centum of the purchase money which the law required to be paid. The court said:

"When the law requires that certain steps must be taken or that incidents of title exist in order to vest a right, a partial compliance with its terms less than a full performance of all the conditions demanded will simply create an inchoate right, which the repeal of the law without a saving clause will destroy."

The court held that payment and not the sending of a draft, was required in order to vest title.

In Cushman vs. Hale, 68 Vt. 444, the petitioner, a public prosecutor, claimed one fourth of certain fines which were paid into the treasury of state after December 1, 1894, upon convictions prior to that date, from which appeals had been taken. The statute gave the prosecutor one fourth of the fines in such cases, but the court held that his right did not attach until the fines were paid, and that the repeal of the statute, after the convictions, but before the fines were paid, deprived him of his right thereto, although they were afterwards paid into the state treasury. The court said, p. 449:

"But on December 1, 1894 [the date of the repeal], the petitioner had no vested right to one fourth of what afterwards became fines paid into the treasury of state. He could not have maintained any action for this fourth, at that time. They had not then become fines. Whether they ever would, was subject to several contingencies. If the respondents entered their appeals in the county court, all that the petitioner had caused to be done in the lower court, in procuring conviction and sentence, would be vacated. They had indicated their purpose to enter

the appeals by taking them. Then the sentences were not absolutely for the payment of fines. It was at the election of the respondents to pay their respective fines, or to neglect to make such payment, and to submit to the alternative sentence at hard labor in the house of correction. In the latter case, the fine, as a money fine, would never exist or become enforceable. These contingencies prevented the petitioner's right to one fourth of these fines from becoming vested. * * * The most that then existed was an inchoate conditional expectancy that these prosecutions might ultimately ripen, as they did, into fines received by the state."

Van Inwagen vs. City of Chicago, 61 Ill. 31, involved an act under which insurance companies, not incorporated under the laws of the State, but doing business in Chicago, were required to pay into the state treasury two per cent. of the premiums on all insurance effected in the city. The act was repealed and the court held that the repeal took from the State the right to sue for the per cent. due on premiums under the act, prior to and at the time of the repealing statute, as the repealing act contained no clause saving such right. The court said, p. 34:

"We believe the rule is well settled that, as to inchoate rights, rights not carried into judgment, and so not executed, can not be, and are not, saved, in the absence of a saving clause in the repealing statute. The doctrine is, that *inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words* in the repealing statute, and unless those rights have become so far perfected as to stand independent of the statute: Butler vs. Palmer, 1 Hill, 324; that is to say executed. * * * The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Kay vs. Goodwin, 4 Moore & Payne, 341; Dwarris on Statutes, 676.

"The clear result of all the authorities is, when a statute, as in this case, gives a right in its nature not vested, but remaining executory, *if it does not become executed before a repeal of the law giving the right, it falls with the law, and it can not thereafter be enforced.*"

Curran vs. Owens, 15 W. Va. 208, involved a statute which

gave a right of action against saloon keepers who sold liquor to any person on whom the plaintiff was dependent for support when the plaintiff's right to support was infringed thereby. The plaintiff sued and had judgment which was reversed, and plaintiff filed an amended petition. The legislature meantime repealed the statute, and re-enacted it so as to make the right of action depend on having given prior notice to the saloon keeper not to sell. The defendant did not raise the question in the lower court, and the plaintiff had judgment. It was held by the Supreme Court that the plaintiff's cause of action was taken away by the repeal.

In Dillon vs. Linder, 36 Wis. 344, it was held that a right of action similar to that given in the foregoing case of Curran vs. Owens does not survive the repeal of the statute, even though a general law provides that "all actions at law or criminal prosecutions now pending or which may hereafter be commenced, founded on any statute of this state shall not be affected by a repeal of the statute." The court held that a right created wholly by statute can not survive the repeal of the statute.

In Bennett vs. Hargus, 1 Neb. 419, it was held that the right of an administrator to sue for an assault on deceased, being wholly statutory, falls with a repeal before suit brought.

In Kertschacke vs. Ludwig, 28 Wis. 430, the court held that a statute creating a right of action against the owner of a dog for injury by the dog without alleging a scienter, gives a cause of action unknown to the common law, and that its repeal after suit filed but before trial, puts an end to the case.

In Kood vs. C. M. & St. P. Ry. Co. 43 Wis. 146, a statute imposing a penalty on railroad companies for charging extortionate rates was repealed by a subsequent statute which contained a clause "provided that nothing herein contained shall in any manner affect any litigation now pending." The plaintiff had instituted his action before the repeal. The court held that it was not saved, saying, p. 153:

"The repeal obliterates the statute as if it had never been passed: obliterates the penalties of the statute, as if they had

never existed. That was within the legislative discretion. So it rested in legislative discretion to repeal the statute without a saving clause. * * * The legislature exercised its discretion by repeal without such saving clause. The legislature could not usurp the judicial function of declaring the effect of the absolute repeal, by the proviso that the repeal which anihilates the statute, shall not affect pending litigation thereunder * * * it is for the courts to say, not for the legislature, how the repeal of a statute may affect pending litigation."

VI.

The company never was liable to account to the State for surplus earnings, in the absence of legislation regulating its tolls.

If this be the true construction of section 23, which it is the duty of this court to determine for itself, no obligation, contingent or otherwise, survived the surrender of the charter in 1873, and the legislation of 1897 therefore impairs the obligation of the contract of surrender, and is an assault upon the vested interests of the company. If the grant of a corporate charter is a contract which is protected by the Constitution of the United States, as the court has repeatedly held, the surrender of a charter is also a contract and entitled to protection. If the company, upon a true construction of its charter, held its surplus earnings prior to 1897 as private property, free from any right of the State thereto, the effect of the legislation of 1897 and of the proceedings of the court thereunder, in this case, is to take the property of the company and to destroy the vested interests of its stockholders therein, as much so as if the legislation were directed against a private citizen, compelling him to account to the State for his earnings, or against a corporation which was under no obligation to pay any portion of its earnings to the State. Calling the statutes remedial does not change the fact, for they have been made effective, if this judgment stands, to transfer to the State property of the company, which would remain in its undisturbed possession, but for the statutes.

We have accepted thus far in our argument the construction put upon section 23 by the Supreme Court of Indiana, which, while holding that future legislation requiring an account is necessary to fix liability upon the company, rejects the claim that legislation regulating tolls is essential for that purpose.

The view which we take of the charter brings us face to face with the question, whether, upon a true construction of section 23, the State had any interest in the surplus earnings of the company, in the absence of legislation regulating its tolls.

For the convenience of the court in considering that question we print here the three sections of the charter which are necessary to be kept in mind in determining the true construction of section 23.

"Section 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road or any part thereof as shall be for the interest of said company, and to change, lower or raise at pleasure: Provided, That the rates established from time to time shall be posted in some conspicuous place or places on said road.

"Section 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"Section 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon

thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses, and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper."

The construction which the Supreme Court of Indiana has put upon section 23 eliminates therefrom the words which we have marked in italics, and makes the section read as if those words were not there. But that is not permissible. Words can neither be added to nor subtracted from a statute. All the words employed are presumed to have been used for a purpose, and due effect must be given to them.

By section 22 the corporation is authorized to charge such tolls and freights as may be for the interest of the company, and to change, lower or raise them at pleasure. Section 23 is a limitation upon this power. It declares that when the aggregate amount of dividends declared shall amount to a certain sum, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided thereafter on the capital employed, but that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per cent. per annum can not be made. It is manifest that the legislature could not in advance fix the tolls so that they would yield *exactly* fifteen per cent. No one could tell in advance precisely what the earnings and expenses of the company might be. But the State, having agreed that the company should not be compelled to reduce the tolls so that a dividend of fifteen per cent. could not be made, was obliged, if she regulated the tolls at all, to fix rates which would yield *at least* fifteen per cent., and which might, and probably would, yield *more*. It was this surplus, if any, that was to go to the common schools.

In the former case in the Superior Court of Marion County the court in its opinion thus analyzed section 23:

1. It gives the legislature the power to "so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed."

2. It defines the time when such legislative action may be taken, not by fixing a certain day or year in the calendar, but it is to be "when the aggregate amount of dividends declared shall amount to the full sum invested, and ten per centum per annum thereon."

3. The legislative power is checked so that "the corporation shall not be compelled by law to reduce their tolls and profits so that a dividend of fifteen per centum per annum can not be made."

4. Conceiving that it might be impossible to make a tariff of tolls and freights that would yield a profit of fifteen per centum per annum, neither more nor less, we have the provision that "the surplus profits, if any, after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools."

The charter did not require the corporation of its own motion at any time to fix its tolls so that not more than fifteen per centum should be earned; it simply reserved to the legislature the power to do so, and provided that if the legislature should exercise the power so reserved, subsequent dividends to the stockholders were to be limited to fifteen per cent. per annum, and the surplus profits, if any, were to go to the common schools.

The last clause of section 23 was intended to enable the legislature to act intelligently in regulating the tolls and freights, by making it the duty of the corporation to furnish the legislature, if required, with a statement of the expenditures and profits.

If the legislature had meant to declare, as the plaintiff contends, that the surplus profits over fifteen per cent. should be paid to the State whenever the aggregate amount of dividends declared had reached the full sum invested, and ten per cent. per annum thereon, section 23 would have been framed as follows:

"When the aggregate amount of dividends declared shall amount to the full sum invested and ten per cent. per annum thereon, not more than fifteen per cent. per annum shall there-

after be divided on the capital employed, and the surplus profits, if any, after reserving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state for the use of the common schools."

In granting to the company authority to fix its tolls and freights, the State did not surrender its right to require that they should be reasonable. No surrender of sovereignty is to be implied. The grant was simply of authority to charge reasonable tolls and freights. Stone vs. Illinois Central R. R. Co., 116 U. S. 347. Pennsylvania Co. vs. Miller, 132 U. S. 75. Covington Turnpike Co. vs. Sandford, 164 U. S. 578. Covington vs. Kentucky, 173 U. S. 231. City of Indianapolis vs. Navin, 151 Ind. 139.

Section 24 did not require that dividends should be made of all the profits. They were to be made of only so much of the profits as the corporation might deem expedient, and the directors were authorized to retain such proportion of the profits, as a contingent fund, to meet subsequent expenses, as they might deem proper. The unlimited discretion in declaring dividends, thus conferred upon the directors, is not subject to judicial revision, except for fraud. New York, etc., R. R. Co. vs. Nickals, 119 U. S. 296. Gibbons vs. Mahon, 136 U. S. 549. Beveridge vs. New York, etc., R. R. Co., 112 N. Y. 1. In re Kernochan, 104 N. Y. 618. State of Maryland vs. Baltimore, etc., R. R. Co., 6 Gill 363. Williams vs. Western Union Tel. Co., 93 N. Y. 162. Ely vs. Sprague, 1 Clark's Ch. 351. Smith vs. Pratville Mfg. Co., 29 Ala. 503. Cook on Corporations, 5th ed. Vol. 2, sections 684 and 545.

In section 23 the State expressly surrenders its power to regulate tolls, to a certain extent, for it is stipulated that "the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made." This is plain and the balance of the section is equally plain. Its provisions in effect are that when the aggregate amount of dividends declared by the directors, in the honest exercise of their discretion, have amounted to the full sum invested and ten per centum per annum thereon, the leg-

islature may then interfere to prevent the tolls and freights from being excessive, *and in order to make the legislative regulation of tolls and freights effective, and as a part of such regulation,* the profits of the company, *after such regulation,* are limited to fifteen per centum per annum on the capital employed, and a reserve necessary for future contingencies. If the profits, *subsequent to legislative regulation,* exceed a sum sufficient to permit the division of fifteen per centum per annum on the capital employed, and to provide a necessary reserve for future contingencies, such excess must be paid over to the treasurer of state for the use of common schools.

We invoke a familiar rule of construction, which is thus expressed by this court.

"Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction." Thornley vs. United States, 113 U. S. 310, 313.

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." Hadden vs. The Collector, 5 Wall. 107, 111.

"The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of words they have used." 1 Greenleaf on Evidence, Sec. 277.

It is said by counsel that the contract must be construed strictly against the defendant, and cases are cited to the point that grants of corporate power, or of immunity from taxation, or from police regulation, are to be strictly construed. That

is a well known and salutary doctrine, but it has no application to the present case. The company is not charged with usurping a corporate franchise. It is sued for money, and the problem is to ascertain upon what contingency it agreed to pay a portion of its surplus profits to the State. Was it whenever the aggregate amount of its dividends declared should amount to the full sum invested, and ten per cent. per annum thereon, or was it only in the event that the legislature should thereafter limit its profits to fifteen per cent. per annum, and regulate its tolls for that purpose? That question, which involves the construction of the contract, is to be answered by turning to the contract itself, which is not to be construed in favor of either party, but fairly, for the purpose of ascertaining from the words used what was intended.

No strained construction is to be adopted, simply because the State is a party. In Tennessee vs. Whitworth, 117 U. S. 129, 137, Chief Justice Waite said:

"In construing statutes which are binding on States as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them, which, taking the whole of the statute together, it is apparent the parties intended they should have."

VII.

The thing adjudged by the judgment of the Superior Court of Marion county in 1876 was that the Company was not liable to account for surplus earnings, in the absence of legislation regulating its tolls.

This is conclusively shown by the opinion which the court filed on overruling the State's demurrer to the complaint and in entering judgment in favor of the company (Rec. 607), and is confirmed by the report of the attorney general to the governor, in which he states that that was the question which was

fully and fairly discussed at the bar, and decided by the court. Rec. 623.

The answer of the Supreme Court of Indiana to the plea of the judgment of 1876 is that the State had no cause of action at that time, with or without demand. The court does not say that the opinion of the Superior Court of Marion County in the former case, may not be examined to ascertain what was decided; it rejects the claim that the decision was or could be on the merits, with the statement that "there can be no merits where there exists no cause of action." Rec. 672.

Speaking of the agreement between the company and the State under which the former suit was brought, the court says:

"The agreement was to submit the validity of the State's claim upon the facts as they existed at the time, not as they would be after more profits were received, and after a demand for an accounting had been refused." Rec. 672.

The reference to "the facts as they existed at that time," is evidently to the facts minus the legislation of 1897, for that is the only subsequent fact affecting the rights of the parties. What is intended by the reference to the facts "as they would be after more profits were received," we do not know, since it has never been claimed that the State had any interest in the profits earned after January 17, 1873.

The defense of the prior adjudication was duly set up in the third paragraph of the answer, which sets forth the judgment and proceedings and alleges "that the matters adjudicated in said cause were and are one and the same with those mentioned in the complaint herein, and that said judgment of March 9, 1876, was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the State of Indiana against this defendant for the payment by defendant of any portion of its profits to the treasurer of state, for the use of the common schools of the State of Indiana, under the said act of January 26, 1847, and the acts amendatory thereof, and of all matters connected with or in any way referring to the claims of the State of Indiana for an accounting with or the

payment by this defendant to said State of Indiana, for the use of its common schools, of any portion of the profits or earnings of defendant under the terms of said original charter, or of the acts amendatory thereof." Rec. 49, 50. This form of pleading prior adjudication was approved in Wilson vs. Vance, Admr., 55 Ind. 584.

As early as 1825 the Supreme Court of Indiana thus stated the rule with respect to prior adjudications:

"Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world." Fischli vs. Fischli, 1 Blackf. 360.

Counsel for the State propose to limit the doctrine to the adjudication of issues of fact. To a similar suggestion the Superior Court of New York more than fifty years ago, in a case of great importance made the following answer:

"Judgments turning exclusively upon questions of law form a very large proportion of all that are rendered in contested suits. If these are to constitute an exception to the general rule, the common law doctrine of estoppel will be robbed of its principal value, and a wide inlet be opened to all those mischiefs of interminable and oppressive litigation which it was designed to prevent." Birckhead vs. Brown, 5 Sandf. 134, at p. 149, cited in Bougher vs. Scobey, 21 Ind. 365, at p. 369.

In Tioga Railroad vs. Blossburg & Corning Railroad, 20 Wall. 137, this court held that the construction put upon a written contract in a suit between the parties thereto, was forever binding upon them, and that the judgment concluded the question of the meaning of the contract, in any subsequent suit.

In New Orleans vs. Citizens' Bank, 167 U. S. 371, 396, Mr. Justice White said:

"In Bank vs. Beverley, 1 How. 134, 139, it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In Tioga

Railroad vs. Blossburg & Corning Railroad, 20 Wall. 137 and Mason Lumber Co. vs. Buchtel, 101 U. S. 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes."

The construction of a will or a written contract presents only a question of law. We must therefore regard the foregoing authorities as establishing the rule that the adjudication of a question of law is no less binding than the determination of an issue of fact. Such also is the effect of the rule recognized by the Supreme Court of Indiana in Thomas vs. Merry, 113 Ind. 83, and in Nickless vs. Pearson, 126 Ind. 477, 486, that an adjudication upon a demurrer to a complaint "is as conclusive and binding upon the parties and operates as res judicata, the same as a judgment rendered upon issues joined and trial by the court or jury."

Another rule equally well settled is thus stated by the Supreme Court of Maine, in Walker vs. Chase, 53 Me. 258, at pages 260, 261:

"The fact that a question has once been litigated can sometimes but not always, be proved by the record. If the fact that a question has been once before litigated can be shown by the record of a court of competent jurisdiction, the former judgment may be pleaded by way of estoppel, or given in evidence under the general issue. Whichever course is adopted, the result will be the same. The parties will be precluded from again litigating the same question.

"If the fact that the same question has been once before litigated can not be shown by the record, the law is now well settled that it may be proved by evidence aliunde, and when thus proved, the result is still the same. In such case, the party sought to be affected by the previous litigation may contest the fact that the same question was then tried; but this fact being established, the result will be all the same, whatever the manner of establishing it may be. It is the fact that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it. The mode of proving it can not affect the quality or legal effect of a fact."

In Russell vs. Place, 94 U. S. 606, 608, Mr. Justice Field thus states the rule:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In Washington Gas Co. vs. District of Columbia, 161 U. S. 316, 329, Mr. Justice White said:

"The elementary rule is that for the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. Russell vs. Place, 94 U. S. 606, 609, 610; Cromwell vs. County of Sac, 94 U. S. 351, 355, 356; Lewis vs. Ocean Navigation & Pier Co. 125 N. Y. 341, 348; Littleton vs. Richardson, 34 N. H. 179, 188; Freeman on Judgments, sec. 273, and authorities there cited."

To the same effect are

Miles vs. Caldwell, 2 Wall. 35, at pages 42, 43, cited in Bottorff vs. Wise, 53 Ind. 32.

Packet Company vs. Sickles, 5 Wall. 580, at page 590.

Doty vs. Brown, 4 N. Y. 71, cited in Campbell vs. Cross, 39 Ind. 155, at p. 159, was a suit against a constable, Brown, for levying on property which the plaintiff, Doty, claimed under a bill of sale from one Sisson. Brown answered that in a former suit between himself and the plaintiff concerning other chattels covered by the same bill of sale judgment had been rendered

in his, Brown's favor, by the justice of the peace, on the ground that the bill of sale was fraudulent. The justice was called as a witness, and testified that he had decided the former case in Brown's favor on the ground that the bill of sale from Sisson to Doty was fraudulent. The court of appeals said (p. 75):

"Parol proof was properly admitted to show what was actually in controversy between the parties before Justice Tracy, and the grounds on which the judgment was rendered."

In Wood vs. Faut, 55 Mich. 185, the defendant relied upon a prior judgment of a justice of the peace in his favor. The plaintiff insisted that the justice had not passed upon the merits of his claim in the former suit, but had dismissed the action upon the ground that it was premature. He called the justice, who was permitted to testify "that he gave judgment for the defendant upon the sole ground that the plaintiff's claim was not due, and that he did not pass upon the merits." The supreme court said:

"The evidence offered, under the circumstances of this case, was proper to show that the merits of the plaintiff's claim were not litigated or passed upon in the former suit."

In Carleton vs. Lombard & Ayers Co. 149 N. Y. 137, plaintiffs bought oil from the defendant, and sold it to third parties, who recovered a judgment against the plaintiffs on the ground that the oil was unmerchantable. The plaintiffs then sued the defendant, and offered in evidence the record in the case in which they had been cast in damages. They offered to prove by parol evidence that the recovery in that suit did not proceed upon the ground of any express warranty, or any other ground than the unmerchantable condition of the oil when delivered to them. The court said (p. 152):

"They were not confined to the record in order to show the point passed upon, but could show by parol proof what questions were actually litigated and decided," citing Doty vs. Brown, 4 N. Y. 71; Russell vs. Place, 94 U. S. 606, and many other cases.

The rule is illustrated by many cases in the Supreme Court

of Indiana. As often as the question has arisen, that court has decided that either party to a prior suit, which is relied upon as an estoppel, may show by parol testimony, if necessary, what was in fact decided.

Hargus vs. Goodman, 12 Ind. 629, was a suit involving the title to real estate. The defendant pleaded a former judgment as an adjudication of the title against the plaintiff. The plaintiff replied that "the court in that case did not receive the evidence of defendant's title in said cause, nor find nor pass upon the legal title of this plaintiff." The court said, at p. 632:

"Whether any matter has been tried between the same parties and decided before is a fact depending in part on parol evidence and partly on the record," and at p. 633:

"The defendant had a right in the present suit to plead that evidence was not heard upon the issue of title, nor did the court find upon that issue. It follows that the demurrer to the reply should have been overruled."

Campbell vs. Cross, 39 Ind. 155, was an action to recover possession of real estate and to quiet plaintiff's title. The defendant answered that in a former suit by the plaintiff against the defendant, the latter was charged with having committed a trespass on the real estate in question, by cutting and carrying away timber, and that the only question litigated in the trial was the title to the real estate, and that judgment was rendered for the defendant. The court held the answer good, saying at p. 159:

"A verdict and judgment for defendant in an action of trespass q. c. f., where he pleads liberum tenementum, do not necessarily in all cases settle the title to be in him. He may plead other matters also, as a denial of the imputed trespass, and the cause may turn on other questions than defendant's title to the property. But parol evidence is competent to show what transpired and what facts were controverted on the former trial, and thus show the ground upon which it was decided," citing Brown vs. Doty, 4 N. Y. 71, and Hargus vs. Goodman, 12 Ind. 629.

Bottorff vs. Wise, 53 Ind. 32, was an action to recover rents and profits of real estate and for timber cut and carried away

and for waste. The defendant pleaded in bar a judgment in a prior action of ejectment brought by the plaintiff in which he claimed damages for the same trespass and waste. The plaintiff replied that on the trial of that action no evidence was offered or heard in relation to damages resulting from waste or trespass, and that the court did not consider or determine any question in reference thereto. The court held that the reply was proper, and that the lower court erred in sustaining a demurrer thereto. The court said, p. 35:

"The presumption is that whatever matters were embraced by the issues were determined, but this presumption is not conclusive. Where a question of former adjudication is relied upon, it is competent for the other party to allege and prove by parol what questions were considered and determined by the court and jury," citing Miles vs. Caldwell, 2 Wall. 35.

Roberts vs. Norris, 67 Ind. 386, was a suit in replevin, in which the defendant pleaded a judgment in his favor in a former suit in replevin brought by the plaintiff against him to recover the same chattels. Plaintiff replied that his former suit was dismissed upon the sole ground that it was brought prematurely before having made a demand, and that the merits were not passed upon. The court held that a demurrer to such a reply was properly overruled, saying, at p. 392:

"As to the admissibility of extrinsic evidence to show upon what ground the former judgment was rendered, and, therefore, its effect, see the cases last above cited; also Angel vs. Hollister, 38 N. Y. 378; Bottorff vs. Wise, 53 Ind. 32."

The Superior Court rejected our offer of the opinion to show that the former judgment in favor of the company was rendered on a consideration of the merits, making the following observations which comprise the whole of the court's opinion on the subject:

"The rule that it may be shown by parol evidence or evidence outside of the record as to the question decided, will not apply when the judgment is based on an order sustaining a demurrer to the complaint. This seems to be an exception to the rule." Rec. 101.

The Supreme Court holds that the evidence would not have changed the result, and was therefore immaterial, because the State had no cause of action at that time, and was properly defeated, for that reason. But, turning to the decision of the Superior Court, why should a judgment based on an order sustaining a demurrer to a complaint be an exception to the general rule? The merits of a controversy may involve nothing but a question of law, as for instance the construction of a will or a contract. Is there no way of concluding such a controversy? Can there be no binding adjudication except where an issue of fact is raised? The appropriate and often times the only way of presenting a controversy which involves the construction of a will or contract is by demurrer to a complaint setting up the instrument. That raises the question, and if the court, having examined and construed the contract, sustains the demurrer and dismisses the complaint upon the ground that the contract properly construed does not impose any obligation upon the defendant in favor of the plaintiff, is that adjudication to go for nought and the plaintiff to be at liberty to renew the contention as often as he pleases?

Of course if the former judgment was on some technical ground, such as a wrong venue, or misjoinder of parties, or because the suit was prematurely brought, and that is made to appear, the judgment ought not to conclude the plaintiff. But if the judgment was on the merits, and that is shown, the plaintiff ought to be, and is barred, and it is immaterial whether the merits involved an issue of fact or a question of law.

We concede that the burden rests upon the party who pleads a former judgment to show that it was rendered upon a consideration of the merits. That is what we undertook to do by producing the written opinion filed by the court in sustaining the demurrer to the former complaint, the highest and most reliable form of parol evidence, to show that the demurrer was sustained upon a consideration of the merits, and not for want of an allegation of demand or for any other technical defect, and that the judgment in favor of the defendant was rendered

upon the ground that its charter did not require it to account for its surplus profits in the absence of legislation regulating its tolls. After an elaborate consideration of various sections of the charter, the conclusion of the court is thus stated in that opinion:

"In view, therefore, of the construction placed upon the different sections, we conclude that the State can not call upon the defendant to pay the surplus earnings over to the State as a part of the school fund, without having previously legislated by regulating the amount of tolls and freights."

The opinion closes with the statement that "the demurrer will *therefore* be sustained to each paragraph of the complaint." Rec. 616, 617.

The ground of the former judgment is also shown by the report of the decision made by the attorney general to the governor, in which he says:

"After full argument before the full bench of three judges of said court and presentation of printed briefs, the court decided against the State, mainly upon the ground that, under the provisions of the special charter to the company, legislation regulating the tolls and freights of the company was a pre-requisite to any recovery for the State." Rec. 623.

If a justice of the peace may testify to the ground upon which he decided a case, surely the written opinion of a court may be received in evidence, to show the ground upon which a demurrer to a complaint was sustained, and therefore the ground upon which judgment was rendered for the defendant.

We did not offer the opinion in evidence to show the process of reasoning by which the court in the former case reached its conclusion; but to show the conclusion itself, in order that it might appear that the demurrer was not sustained, and that the action was not dismissed, on the ground that the suit was premature, or for any other technical defect, but upon the ground that the State, on a proper construction of defendant's charter, was not entitled to a share of its surplus profits, in the absence of legislation regulating its tolls. And we submit that that construction thus put upon the charter in a suit, in which the point

was drawn in question and decided, forever concludes the parties.

No case has been produced by counsel for the State in support of the view that a judgment on demurrer is an exception to the general rule that the point actually decided in a prior suit may be established by parol testimony, if necessary.

Birckhead vs. Brown, 5 Sandf. 134 (N. Y. Superior Ct.), was a case of great importance argued by the leaders of the New York bar. It was a suit to charge the defendant upon a contract, under which the plaintiff claimed that the defendant agreed to accept certain drafts. The defendant offered in evidence the record of a former suit brought against him by the plaintiff, upon the same contract, to recover for the defendant's failure to accept other drafts, in which judgment was rendered for the defendant. The record did not disclose upon what ground the court had decided in the defendant's favor, but he offered the opinion of the judges to show that their decision was on the ground that the contract, properly construed, did not require him to accept the drafts. The court said, at p. 151:

"In our opinion, extrinsic proof may, with the same propriety, be admitted to explain the judgment of the court, as the verdict of the jury, and the reasons given by the court upon the delivery of the judgment furnish the necessary evidence."

That was not a judgment on a demurrer; it was a judgment on a special verdict, which, as the court points out, is the same thing as a judgment on a demurrer, because it is the court's conclusion of law on facts established by a special verdict, while a judgment on demurrer is the court's conclusion of law on the facts alleged, and admitted by the demurrer. The whole of the opinion of the court on the subject is as follows, at pages 150, 151:

"It must be admitted that several and distinct questions of law, questions affecting as well the validity of a defence as the right of the plaintiff to recover, may arise upon a special verdict, and in such cases it can not be ascertained from the record alone upon what grounds the judgment proceeded. In other words, what were the precise questions that the court

meant to determine. But when the plaintiff demurs to a special plea, and judgment is given for the defendant, there is the same difficulty, since it can not then be known from the record alone, whether the judgment was founded upon the sufficiency of the plea, or the insufficiency of the declaration. The reply to the objection is the same in both cases. In this State the law was settled by the decision of the Court of Error, in Wood vs. Jackson, 8 Wend. 1-49, 18 Wend. 107, that when the record fails to disclose the grounds of the judgment, parol evidence, to show what were the questions raised upon the trial and passed upon by the jury, may be admitted, and the effect of the judgment, as an estoppel, be thus established. In our opinion, extrinsic proof may, with the same propriety, be admitted to explain the judgment of the court, as the verdict of the jury, and the reasons given by the court upon the delivery of the judgment, furnish the necessary evidence."

Spicer vs. United States, 5 Court of Claims, 34, was an action for breach of the defendants' contract to receive and pay for certain horses. The defendants pleaded a judgment in their favor in a former suit brought by the plaintiff on the same cause of action. The following statement is taken from the report at p. 36: "In the former case, judgment went against the claimant on demurrer to his petition. The defendants now plead that judgment in bar. The claimant objects and shows by the opinion of the court that his former petition was in fact dismissed for a defect, now remedied, in not stating that he owned and tendered certain horses which the defendants agreed to receive."

The court said, at p. 50:

"If it were necessary to pursue the subject further, I should say that the principle now established by the Supreme Court, that parol evidence is admissible to show that what properly might have been decided under the pleadings was in fact passed upon at the trial, is applicable to decisions on demurrer so far as to warrant us in looking into the opinion rendered. In this case that opinion shows that the former decision went upon the precise objection taken by the defendants, 'that the claimant never delivered, or offered to deliver, any portion of the horses which he contracted to furnish;' or, as the opinion states it, 'none of the horses were ever offered for acceptance.' "

In Kleinschmidt vs. Binzel, 14 Mont. 31, it was held that a judgment for the defendant in a former suit, based upon a demurrer to the declaration, the demurrer covering objections to form as well as to the merits, was not a bar to the subsequent suit, "it not having been shown that such judgment proceeded upon a consideration of the merits," p. 61. The court was evidently of opinion that if the defendant had shown by parol testimony that the demurrer in the former suit was sustained upon a consideration of the merits, the judgment thereon would have been a bar. The following is the syllabus:

"Where a demurrer has been interposed to a complaint upon several grounds, embracing objections to form as well as to the merits, and is sustained generally, and the pleader abides by his pleading, and suffers judgment, such judgment does not estop the same party in another action, between the same parties or their privies, where it neither appears by the record, or by extraneous evidence, that the demurrer in the former suit was sustained on consideration of the merits; and, in the absence of such showing, it will be presumed to have been sustained for defects of form rather than upon each of the several grounds alleged."

These cases, we submit, warrant the conclusion that a judgment on demurrer is no exception to the rule which permits resort to parol testimony, in the interest of truth and justice, to show what was really decided in a prior suit.

Since "it is the fact that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it" (to use the language of the Supreme Court of Maine, in Walker vs. Chase, 53 Me. 258) and since the purpose of allowing parol testimony is to establish the very truth and ascertain what point was in fact decided in the prior suit, there would seem to be no good reason why parol testimony should not be received to show upon what ground a demurrer, that might have been sustained on more than one ground, was in fact sustained. Otherwise, when the order sustaining the demurrer is followed by a judgment, the parties may be deprived of the benefit of the thing adjudged and be

obliged to contest it again, as if it had never been argued and considered and judicially determined.

But it is said that, if the former suit of the State was premature for want of a demand, the court had no right to decide any other question. But the court had jurisdiction of the parties, and the right to determine what questions were before it for decision, and whether a demand was necessary. Its determination that the question of the construction of the charter was properly before it for decision, and its decision thereof, even if erroneous, must stand. It can not be attacked collaterally but only by appeal. Its decision on the merits involved a decision that no demand was necessary. Moreover, the defendant could waive demand, if one were necessary, and submit to the determination of the merits, as in fact it had agreed to do by the written contract with the State, under which it had bound itself to submit the question of its liability under its charter to the decision of the Superior Court of Marion County, and to enter its appearance to a suit to be instituted by the State in that court for that purpose.

"A request for the payment of a debt is immaterial unless the parties to the contract have stipulated that it shall be made; if they have not the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due." Parke B. on Walton vs. Mascall, 13 M. & W. 452, 458.

"As a general rule money due may be sued for without any previous demand therefor." School Town of Princeton vs. Gebhart, 61 Ind. 187, 191.

A note payable on demand may be sued for without demand.

"In assumpsit for money had and received where the complaint alleges the receipt of money by defendant to the use and benefit of plaintiff, it need not allege a demand." Field vs. Brown, 146 Ind. 293 (Syllabus).

In Vyse vs. Wakefield, 6 M. & W. 442, 452, Baron Abinger stated the general rule to be "that where a party stipulates to

do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled."

Numerous cases illustrating these rules may be found in Leake on Contracts (3d ed.) 559-561, and in Harriman on Contracts (2d ed.) chap. 13, pages 170 and 171.

The following rule stated by Chitty in his work on Contracts (11th ed.) 1071, is quoted in several cases in courts of last resort:

"Unless there be an express stipulation in the contract, or it be requisite from the peculiar nature thereof that a request or demand of performance shall be made, such request or demand is not essential to complete the cause of action, but the party is bound to perform his contract without being required so to do."

The former suit was brought nearly two years after the defendant had surrendered its charter. If the defendant had made surplus profits in 1870 and in 1871 and 1872, which belonged to the State, they should certainly have been paid before 1875, and the suit instituted in that year was not premature.

The State must accept the alternative, that the prior adjudication is a bar to the present suit, or that a cause of action has been created, since 1876, by retroactive and unconstitutional legislation.

VIII.

The judgment under review destroys the vested right of the company under the judgment of 1876 in its favor, and takes its property without due process of law.

We recognize the rule that the failure of the court of a State to give effect to a prior judgment of a court of the same State, does not ordinarily present a federal question; but where, after the surrender of a charter, it has been adjudicated between the State and the corporation that the latter is not liable to the State under the charter, and in the face of such surrender and adjudication, the State passes, and its courts enforce, legislation providing for a new suit in its own favor on the old claim, and the courts of the State decline to give effect to the prior adjudication, we have a case in which property of the company has been taken by the State without due process of law, through the instrumentality of its legislative, executive and judicial departments, acting jointly and severally. The provisions of the Fourteenth Amendment refer to all the instrumentalities of the State, including its legislative, executive and judicial authorities. C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.

The judgment of a court of law creates a vested right, of which the owner may not be deprived by any agency of the State, except by due process of law. A revision of the judgment although by a proceeding judicial in form, may not be due process of law. This has been held in many cases of appeals or new trials authorized by statutes, passed after the judgment has become final.

In Atkinson vs. Dunlap, 50 Maine, 111, 115, the court said:

"Judgments may be subject to be revised according to laws existing at the time of their rendition. This is a fixed and settled qualification of rights vested under them. But with this exception, there can be no higher title to any right or interest whatever, than what arises from a regular judgment of law."

In Davis vs. Menasha, 21 Wis. 497, 502, the court held that a statute granting a right to review a judgment, where none

existed at the time the judgment was rendered, was unconstitutional, saying:

"So that this enactment so far as this cause is concerned must be held invalid; both because it attempts to destroy vested rights, and also because it is an exercise of power on the part of the legislature which belongs to the courts."

In Town of Lancaster vs. Barr, 25 Wis. 560, 562, the court said:

"The policy of the law or constitutional principle involved very clearly is, that rights of property once vested, or liability or want of liability once established, by judicial decision then final between the parties, shall not afterward be disturbed, or the controversy opened, by mere legislative enactment."

In Beaupre vs. Hoerr, 13 Minn. 366, 367, the court said:

"The judgment in the case at bar was the property of the defendant, and, as the absolute owner of it, his right thereto and therein was a vested right, and of the highest nature, being established by the sentence of a court of jurisdiction; a sentence in this case not subject to be set aside under the laws in force at the time when his right became consummated and perfect. Now can the legislature pass a valid act by which after the time for appeal has expired under existing law, he may be divested of his right either by permitting the debtor to appeal, and thereby changing a judgment absolute to a judgment nisi, or by authorizing an appellate court to disregard his fixed and vested right in his judgment, and re-examine the case just as if his right had never become fixed and vested? If the legislature can do this by a law passed six days after the lapse of the time allowed for appeal, can any reason be given why it may not be done six years, or six hundred years after the lapse of such time?"

In Germania Savings Bank vs. Suspension Bridge, 159 N. Y. 362, 368, the court said:

"If, however, according to the law existing when the statute extending the time to appeal, or granting a new right of appeal, was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right and was property of which the owner could not be deprived by an act of the legislature, or otherwise than

through due process of law. An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and finally decided, although it might result in the reversal of the judgment and be in form a judicial proceeding, would not be what is known as due process of law, which is not satisfied by a judgment based upon an unconstitutional statute.

"A judgment is a contract which is subject to interference by the courts so long as the right of appeal therefrom exists, but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract and becomes property, which can be disposed of or affected only by the act of the owner, or through the power of eminent domain. It is, then, beyond the reach of legislation affecting the remedy, because it has become an absolute right which can not be impaired by statute."

The cases are numerous and uniform in which it has been held that statutes providing for appeals from judgments which were final when rendered, are void because amounting to an impairment of vested interests, without due process of law.

Gompf vs. Wolfinger, 67 Ohio St. 144, 152.
McCabe vs. Emerson, 18 Penn. St. 111.
Griffin's Executors vs. Cunningham, 20 Grat. 31.
Wieland vs. Schillock, 24 Minn. 345.
Dorsey vs. Dorsey, 37 Maryland, 64, 74.

In Memphis vs. U. S., 97 U. S. 293, a creditor of the city of Memphis who had recovered a judgment against the city, commenced a proceeding in mandamus to compel the levy of a tax for the payment of the judgment and secured an alternative writ. On the next day after securing the writ the legislature passed an act repealing the law under which the mandamus proceeding was commenced. This court held the law unconstitutional. Mr. Justice Strong said:

"But before that day [on which the repealing act was passed] we think the relator had acquired a vested right by his judgment and his alternative writ of mandamus to have a tax levied sufficient to pay the debt due to him from the city, a right of which he could be deprived by no subsequent action of the legislature." 97 U. S. 297.

If a statute providing for the review of a judgment by appeal, where no right of review existed when the judgment was rendered, is in excess of the legislative power, surely a statute of a State authorizing and directing a new suit in its own favor, to assert a right which has already been adjudicated against it, is unconstitutional.

We submit that the act of January 27, requiring the company to account for past earnings, and the act of March 4, appropriating them to the use of the State and directing the attorney general to sue for them, impair the vested rights of the company under the judgment of 1876, and that the proceedings in this case, being taken under and by virtue of those statutes alont, are not due process of law. Proceedings which are authorized by, and depend wholly upon, an unconstitutional law, although judicial in form, are not due process of law, and so the cases we have cited, declare.

IX.

The judgment gives effect to the legislation of 1897, not only in permitting a recovery, but in fixing the amount.

Section 23 of the original charter requires an account of dividends declared. The amendment of February 24, 1897, and the act of March 4, 1897, require an account of net earnings. The court in fixing the amount of the recovery, has adopted the directions of these two acts of 1897, thereby giving effect to them. If the account had been taken on the basis of dividends declared, as fixed by the original charter, and not on the basis of net earnings, as prescribed by the legislation of 1897, the result would have been quite different.

The computation by which the Superior Court arrived at the amount of the judgment is found at page 103 of the record, and is summarized as follows:

Investment	$1,216,690.05
Ten per cent. per annum thereon	1,830,943.31
Investment and ten per cent.	$3,047,633.36
Dividends declared	3,108,602.68
Excess of dividends over investment and ten per cent. thereon	$60,969.32
Net earnings for the year 1870	278,720.54
" " " " " 1871	336,988.96
" " " " " 1872 to Nov. 30	296,589.00
" " from Nov. 30, 1872, to January 17, 1873	103,403.26
Balance of surplus profits as of December 31, 1869	230,201.24
Total	$1,306,872.32
Deduct fifteen per cent. on investment ($1,216,690.05) from January 1, 1870, to January 17, 1873	556,128.88
Balance due State January 17, 1873	$750,743.44
Interest thereon from March 13, 1897, the date on which the demand was made, to the date of the judgment	163,161.57
Amount of judgment	$913,905.01

The court arrived at the item of $230,201.24, in the foregoing calculation, by deducting from the surplus on hand December 31, 1869 ($1,049,365.03) the moneys expended by the company after 1868, for betterments, equipment and the extension of its road from Terre Haute west to the Illinois State line, amounting to $819,163.79. (Rec. 99.)

It therefore appears that the court charged the company with this surplus of $239,201.25 (which was not dividends declared) and with the net earnings from January 1, 1870, to January 17, 1873, and with the amount ($60,969.32) by which the dividends declared up to December 31, 1869, exceeded the investment and ten per cent. thereon. It deducted from the total sum fifteen per cent. on the sum in-

vested from January 1, 1870, to January 17, 1873. In other words, the company was charged, not with the dividends declared, as provided in section 23 of the original charter, but with the total net earnings from the beginning, less the sum of $819,163.79 expended as aforesaid, subsequent to 1868 for betterments, equipment, and extension of the road from Terre Haute to the Illinois state line.

The calculation suggested by the Supreme Court, at pages 680-681 of the record also charges the company with net earnings from the beginning. It charges it with $193,104 excess of dividends December 31, 1871, and with $138,552 on account of net earnings of 1870 and 1871, in excess of dividends declared, and with the total net earnings of 1872 ($296,589), and with $185,510 plus $448,959 (or $634,469) on account of balance of surplus earnings on hand December 31, 1869.

Both calculations charge the company with the net earnings from the beginning of its operations, for they charge it with all the dividends declared up to January 17, 1873, and with the balance of its net earnings not declared in dividends, less certain arbitrary deductions.

It appears clearly, therefore, that the judgment under review gives effect to the legislation of 1897, not only in so far as it creates an obligation on the part of the company, but in determining the amount of the liability, there being no basis for the recovery adopted by the court, except as found in the act of February 24, 1897, amending section 23 of the charter, and in the act of March 4, 1897, directing this suit to be instituted, and declaring the method of taking the account.

It must be remembered that both the master and the court found that the directors had been guilty of no fraud, and that the dividends actually declared must therefore be treated as the dividends provided for by section 23 of the original charter. Section 24 gave the directors the largest discretion in the declaration of dividends, requiring a distribution only "of so much of the profits as the corporation may deem expedient," and authorizing the board to "retain such proportion of the profits as a contingent fund to meet subsequent expenses, as they

shall deem proper." The rule is well settled that under such a charter, the discretion of the board of directors in determining the dividends to be declared, the occasion for a surplus fund, and the amount of such fund, is not subject to judicial revision in the absence of fraud.

2 Cook on Corporations, sections 545, 684;
State of Maryland vs. B. & O. R. R. Co. 6 Gill. 363;
New York, etc., R. R. Co. vs. Nickals, 119 U. S. 296;
Gibbons vs. Mahon, 136 U. S. 549;
Williams vs. Western Union Tel. Co., 93 N. Y. 162;
In re Kernochan, 104 N. Y. 618;
Beveridge vs. Elevated R. R. Co., 112 N. Y. 1;
Smith vs. Prattville, etc., Co., 29 Ala. 503;
Ely vs. Sprague, 1 Clark's Chan. 351.

The outstanding shares of the capital stock of the company amount to $1,988,150, which represents the actual cost of the road between Terre Haute & Indianapolis. It does not include the cost of the extension from Terre Haute west to the Illinois state line, which was built after 1868 with the proceeds of bonds. In estimating the "full sum invested," which, with 10 per cent. per annum thereon, was first to be paid back, the court refused to allow the cost of the construction of the road, but only the amount paid in cash for stock by original subscribers. It cut out two stock dividends amounting to $588,300, which represented earnings, not drawn out but actually put into construction as accretions to capital, for which stock was issued in 1856 and 1864, and sundry other stock lawfully issued. In fixing the sum invested in stock by stockholders at $1,216,690.-05 the court excluded, among other items, the following stock:

(1) Stock issued to stockholders as a stock dividend in November, 1856, $211,600.

(2) Stock issued to stockholders as a stock dividend in April, 1864, $376,700.

(3) Stock issued to John Rose for services August, 1852, $10,000.

(4) Stock issued to C. Rose, extra allowance, April, 1853, $6,000.

(5) Stock issued on interest certificates for interest allowed on advanced payments, $28,746.02.

The court also deducted from the par value of the stock issued the following amounts for discount on bonds sold:

(1) Discount on $45,100 six per cent. bonds surrendered for stock at par, $6,264.18.

(2) Discount on $545,000 seven per cent. bonds surrendered for stock at par, $58,796.42.

If the court, in taking the account, had included, as part of "the full sum invested," the earnings which the stockholders permitted to remain in the company and to be applied to construction, for which stock dividends were issued to them, nothing would have been found due to the State, even if, on the other side of the account, the stock dividends had been included in and considered as part of the dividends declared.

In stating the dividends declared, the Superior Court treated the internal revenue tax on dividends amounting to $117,137.48, paid by the company to the United States, as part of the "dividends declared" (Rec. 98) in disregard of the decisions of this court construing the federal statute, which regards the tax as a debt due from the Company. Railroad Co. vs. Collector, 100 U. S. 595; United States vs. Erie Railway Co. 106 U. S. 327; Bailey vs. Railroad Co. 106 U. S. 109; Memphis, etc., R. R. Co. vs. United States, 108 U. S. 228.

CONCLUSION.

Each of the four statutes of the State of Indiana passed in 1897, and challenged in this case, is clearly unconstitutional. The act of January 27, without constitutional right, and in pursuance only of the pretended authority of a charter which had been surrendered twenty-four years before, required the company to account to the State for its earnings and private property, commencing fifty years back. The act of February 18 declared the contract of surrender, made twenty-four years before, to be inoperative. The act of February 24 undertook to amend a charter, which never was subject to amendment, and which moreover had been surrendered twenty-four years be-

fore, by imposing new and different obligations and declaring that the liability of the company should "be the same as though this amendment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State." The act of March 4 appropriated the company's private property to the use of the State, and directed the attorney general to sue for its recovery.

Counsel can not defend this legislation. The only answer they make, is that the Supreme Court of Indiana has not given effect to it; which is the more remarkable, in view of the relator's message to the general assembly, in submitting the draft of the first act, in which he said that the former judgment was an adjudication and a bar to any further action unless the general assembly should "by antecedent legislation make a case different from the one presented then," and that "nothing could be done" without "the much needed legislation," which he urged. The state court has given effect to the legislation, not as providing a remedy for a pre-existing cause of action, but as creating a cause of action, which did not exist before the statutes were passed, and which would not exist to-day, as the Supreme Court of Indiana expressly declares, if they had not been passed.

We submit that the judgment of 1876 is a bar to the present suit, and that the vested rights of the company thereunder are destroyed without due process of law, as the result of the unconstitutional legislation of 1897, and of the proceedings of the State thereunder, in this case; or, that a cause of action has been created since the date of that judgment, by retroactive and unconstitutional legislation. The State must accept one or the other of these alternatives, and either requires that the judgment under review should be reversed.

Respectfully submitted,

LAWRENCE MAXWELL, Jr.,
SAMUEL O. PICKENS,
JOHN G. WILLIAMS,
Counsel for the Plaintiff in Error.

THE LEGISLATION OF 1897.

Acts of 1897, page 8, chapter viii.

An Act to require the Terre Haute & Richmond Railroad Company, and the Terre Haute and Indianapolis Railroad Company, pursuant to the provisions of section twenty-three (23) of an act entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," approved January 26, 1847, to furnish the legislature with a correct statement of the amount of expenditures and the amount of profits, after deducting all expenses of the Terre Haute and Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company from the 26th day of January, 1847, to the 17th day of January, 1873, and declaring an emergency.

[Approved January 27, 1897.]

Whereas, By section twenty-three (23) of an act of the general assembly of the state of Indiana, entitled "An act to incorporate the Terre Haute & Richmond Railroad Company," approved January 26, 1847, it is provided among other things, that the surplus profits of said road in certain contingencies shall be paid over to the treasurer of the state for the use of the common schools, and that it shall be the duty of said corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same; and

Whereas, It has been made known to this general assembly that a large amount of money is due to the state of Indiana for the use of the common schools under this section, but the particular amount thereof is not known, and it is necessary that such statement shall be made in order that this general assembly may be advised of what legislation is needed in order to enforce the rights of the state; and

Whereas, The books and papers of said railroad company are now in the possession of the Terre Haute & Indianapolis Railroad Company; now therefore,

Section 1. Be it enacted by the general assembly of the State of Indiana, That the Terre Haute & Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company

be and they are hereby required to make and file with the attorney general of this State for the use of the general assembly, on or before the 6th day of February, 1897, a statement under the oath of the president and secretary of said roads showing:

1. The amount of expenditures in the construction and operation of said roads from the 26th day of January, 1847, to the 17th day of January, 1873, inclusive.

2. The total amount of receipts during the corresponding period.

3. The total amount of profits in the operation of said roads during said period.

4. The detail of the expenditures:
   a. In the construction of said road.
   b. In the operation thereof during the corresponding period.

5. What disposition has been made of the profits:
   a. By way of dividends declared and paid from time to time.
   b. By way of reinvestments or other disposition.

Sec. 2. The attorney general of the State do immediately upon the passage of this bill cause notice thereof to be served upon the president or secretary or some member of the board of directors of the said Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company, by personal notice if such officers or directors or either of them can be found within the state of Indiana, and in the event that neither or any of them can be found within the state of Indiana, by publication in a daily newspaper of general circulation printed and published in the cities of Indianapolis and Terre Haute, by three consecutive publications, and demand of said companies the making and furnishing of said statement.

Sec. 3. Immediately following the 6th day of February, 1897, or sooner in the event such statement is filed with him, the attorney general shall report to this general assembly such statement, and in the event such statement is not filed with him, to report that fact, together with the steps that have been taken by him to notify said companies of the passage of this law.

Sec. 4. Whereas, an emergency exists for the immediate taking effect of this law, the same shall be in force from and after its passage.

Acts of 1897, p. 38, chapter xxxvii.

An Act to amend section thirty-six of an act entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852, and declaring an emergency.

[Approved February 18, 1897.]

Section 1. Be it enacted by the general assembly of the state of Indiana, that section thirty-six of the above entitled act be amended to read as follows:

Section 36. All existing railroad companies may acquire all the powers or benefits conferred by this act, by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified, as fully as they would have had and been if organized under this act: Provided, however, that whenever any railroad organized under any special charter granted by the state of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, whether inchoate or complete, in favor of the state of Indiana, shall be and they are hereby expressly reserved to said state notwithstanding such acceptance, and said state may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the general assembly may deem appropriate, and notwithstanding such acceptance any and all provisions of said charter may be amended, repealed or added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

Acts of 1897, p. 59, chapter xlvi.

[Approved February 24, 1897.]

An Act to amend section twenty-three of an act entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," approved January 26th, 1847, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the state of Indiana, that section twenty-three (23) of the above entitled act be amended to read as follows:

Section 23. That when the aggregate amount of dividends declared or earned received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road with ten per cent. interest per annum thereon, the general assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the general assembly, from time to time, whenever required, with correct statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate of the dividends declared shall amount, or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies shall be semiannually, on the first Monday in July and December of each year, paid over to the treasurer of state for the use of common schools. And the general assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said treasurer of state for the use of said schools, and whenever said general assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the state. And the right of the state upon any such inquiry or upon any suit that may be authorized to compel

such accounting shall be the same as though this amendment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the state: Provided, however, that nothing in this act contained shall be in any wise construed as lessening, impairing or releasing in any manner any right of or any liability to the state of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said state as fully as though this section had not been amended.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

Acts of 1897, p. 145, chapter xcix.

An Act to require the Terre Haute and Indianapolis Railroad Company, its officers, agents and persons in possession thereof to account to the attorney general of the state for the amounts due and owing to the treasurer of state for the use of common schools, by reason of the excess of its receipts over its expenditures under the provisions of its charter appropriating the same to the use of common schools, authorizing a demand for such accounting and suits to enforce the same, the appointment of additional counsel, and providing for the expenses of such litigation and the compensation therefor, creating an auditing board and prescribing its powers, authorizing the attorney general to bid upon any sale of said road and authorizing the payment of such bid, and providing for the operation of said road until the general assembly shall determine in regard to the disposition thereof, and for other purposes, and declaring an emergency.

[Approved March 4, 1897.]

Whereas, on the 26th day of January, 1847, the general assembly of the state of Indiana granted a special charter to the president and directors of the Terre Haute and Richmond Railroad Company, for the purpose of constructing and operating a railroad commencing at some point on the western line of the state of Indiana and running eastwardly through Terre Haute, Greencastle and Indianapolis to the city of Richmond; and,

Whereas, said railroad was constructed from a certain point on the western line of Indiana, eastwardly through Terre Haute, Greencastle to Indianapolis, under the privileges granted by said charter; and,

Whereas, by the terms of an act approved March 6th, 1865, the name of said company was changed to that of the Terre Haute & Indianapolis Railroad Company, and by said act all the contracts, obligations, and liabilities, theretofore existing under the name of the president and directors of the Terre Haute & Richmond Railroad Company were continued in full force, notwithstanding the change in the corporate name; and

Whereas, by the terms and conditions of such charter, said corporation, among other things, was required to pay to the treasurer of the state of Indiana, for the use of its common schools, certain of its surplus profits; and,

Whereas, by the terms and conditions of said charter, it became and was the duty of said company to make and keep complete records of the expense of building and repairing said roads, and each section thereto, together with its incidental expenses, and also an account of the tolls and earnings thereof; and,

Whereas, no sufficient or satisfactory statement or report has been made by said corporation or its successors to the general assembly, or to any officer of the state, of the amount of expenditures or earnings, or of the amount of profits after deducting the expenses, or of the conduct of its business, so as to inform the general assembly upon that subject, notwithstanding a demand therefor has been duly made upon said company and its successors, under the authority and by the direction of the general assembly; and,

Whereas, no moneys have ever been paid by said company to the treasurer of state for the use of the common schools of the state, and it is believed and represented to the general assembly that there is now and has for a long time been due to the treasurer of state, for the use of said common schools, a large sum of money by reason of the excess of earnings over expenses under the terms and provisions of said charter as it originally existed, and as it has been subsequently amended, but it is not possible, except by judicial proceedings, to ascertain and determine the exact amount thereof; now, therefore,

Section 1. Be it enacted by the general assembly of the state

of Indiana, that all the surplus profits arising from the operation of, and which were received by the Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company from and after the date when said corporation had earned and received profits in its business from which it could and should, as in duty bound under this act, have declared dividends equal in the aggregate to the amount of the full sum invested and ten per centum per annum thereon, in excess of fifteen per centum per annum on the capital employed, after paying the expenses of operation and reserving such proportion as was necessary for future contingencies, be and the same are hereby declared to be due and payable to the treasurer of state for the use of common schools, and are hereby appropriated for that purpose.

Section 2. That the Terre Haute & Indianapolis Railroad Company, its officers, agents, employes and persons in possession thereof, without reference to the method or manner of their appointment or possession, are hereby required to forthwith account to the attorney general of the state for the amounts due and owing to the treasurer of state for the use of common schools, by reason of the excess of its receipts over and above its expenditures as provided and required by its charter and by the amendments thereto, and upon such accounting to pay over to said attorney general, for said treasurer of state, for the use of the common schools as aforesaid, the amounts so found due upon such accounting, being the total receipts by said railroad company up to and including the 17th day of January, 1873, from the period when the receipts arising from the operation of said road shall have equaled the amount invested in the construction of said road, together with interest thereon at the rate of ten per centum per annum, in excess of fifteen per centum per annum upon the capital used in the construction of said road.

Sec. 3. Said attorney general shall, immediately upon the passage of this act, make a demand upon said company, its officers, and any receiver in possession thereof under the order of any court, for such accounting and for the payment of the money due upon such accounting, under said charter and under any amendment or amendments thereto, to the treasurer of state, for the use of common schools.

Sec. 4. In the event said railroad company shall fail to promptly comply with said demand and to make such accounting and

to pay over said moneys to said attorney general, it shall be the duty of the attorney general to take such steps and proceedings in any court of competent jurisdiction, having jurisdiction of the subject matter thereof, to compel such accounting and the payment by said railroad company, or the receiver thereof under the appointment of any court, of the moneys so due to the treasurer of state for said common schools, under said charter or any amendments thereto, and for the purpose of enabling said attorney general to comply with this act, he is hereby authorized and empowered to employ such additional legal counsel as in his judgment is necessary, to assist him therein, and he and his assistants are further authorized to select and employ one or more expert accountants, and one stenographer to assist them in the performance of such duties.

Sec. 5. The governor, secretary of state and auditor of state are hereby constituted a board for the purpose of auditing and authorizing the payment of the expenses arising in the performance of the duties hereby imposed upon the attorney general and his assistants, and said board shall, upon the recommendation of the attorney general, from time to time, allow to the assistants so employed, the accountants and the stenographer, such sums as in the opinion of the board shall be justly due for the services rendered, and also all the expenses actually incurred; and thereupon the auditor of state shall draw his warrant for such sums upon the treasurer of state, and the same shall be paid out of any funds not otherwise appropriated. But the amounts to be paid to the said additional counsel or other persons so employed shall be determined by the board of audit hereinafter provided for.

Sec. 6. In event the railroad shall, in connection with the proceedings herein authorized, be directed to be sold by the decree of any court, and it shall be necessary in the opinion of the attorney general and his assistants to protect the interests of the state by bidding at such sale, they shall so recommend in writing to said board, and thereupon said board shall determine what amount should be bid in order to protect the interests of the state, and shall advise him of the limit beyond which he shall not bid, and upon such sale, said attorney general shall, in the name and for the use of the state, bid for said property according to his judgment, and not exceeding the amounts authorized by said board, and in the event of a sale to the state, the auditor of state shall draw his warrant upon the treasurer

of state for such sum, which shall be paid out of any sum in the treasury not otherwise appropriated, and upon the confirmation of said sale, the governor, with the concurrence and consent of the remaining members of said board, shall designate and appoint the proper officers to take charge of and operate said property, or said board may, in its discretion, lease the same until provision shall be made by the general assembly for the disposition of said property.

Sec. 7. The attorney general shall retain out of the moneys collected a commission of ten (10) per cent., and shall pay to the assistants so employed by him commissions not exceeding in the aggregate fifteen per cent., said commissions to be apportioned by the attorney general between said assistants in his discretion, and the residue of said moneys so collected shall by said attorney general be paid over to the treasurer of state for the use of common schools, except as to the amounts that have heretofore been paid out by the authority of said auditing board on account of the expenses of the litigation, which said sums shall be repaid to the general fund, and the residue only paid over for the use of (the) common schools: Provided, however, that no sums other than his actual expenses incurred during the litigation shall be paid to the attorney general, except as he shall collect from said railroad company, or its receiver, an amount for the use of common schools, and in the payment of such commission to the assistants, credit shall be given to the state for any sums that may have been theretofore paid to them or either of them in any manner on the allowances made from time to time by said board. And, provided further, that in the event any litigation that may be instituted to enforce such liability, shall not be fully and finally determined and the moneys collected and paid over before the expiration of the term of office of said attorney general, he shall continue in said employment as special counsel for the state until said litigation has been fully and finally determined, and the moneys collected and paid over, notwithstanding his term of office may have expired and his right, power and compensation shall be continued as though he were still acting as such attorney general, and as though said litigation had been completed during his term of office, but no auditing board shall be authorized to make any allowances or payments to him other than his actual expenses as aforesaid.

Sec. 8. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.